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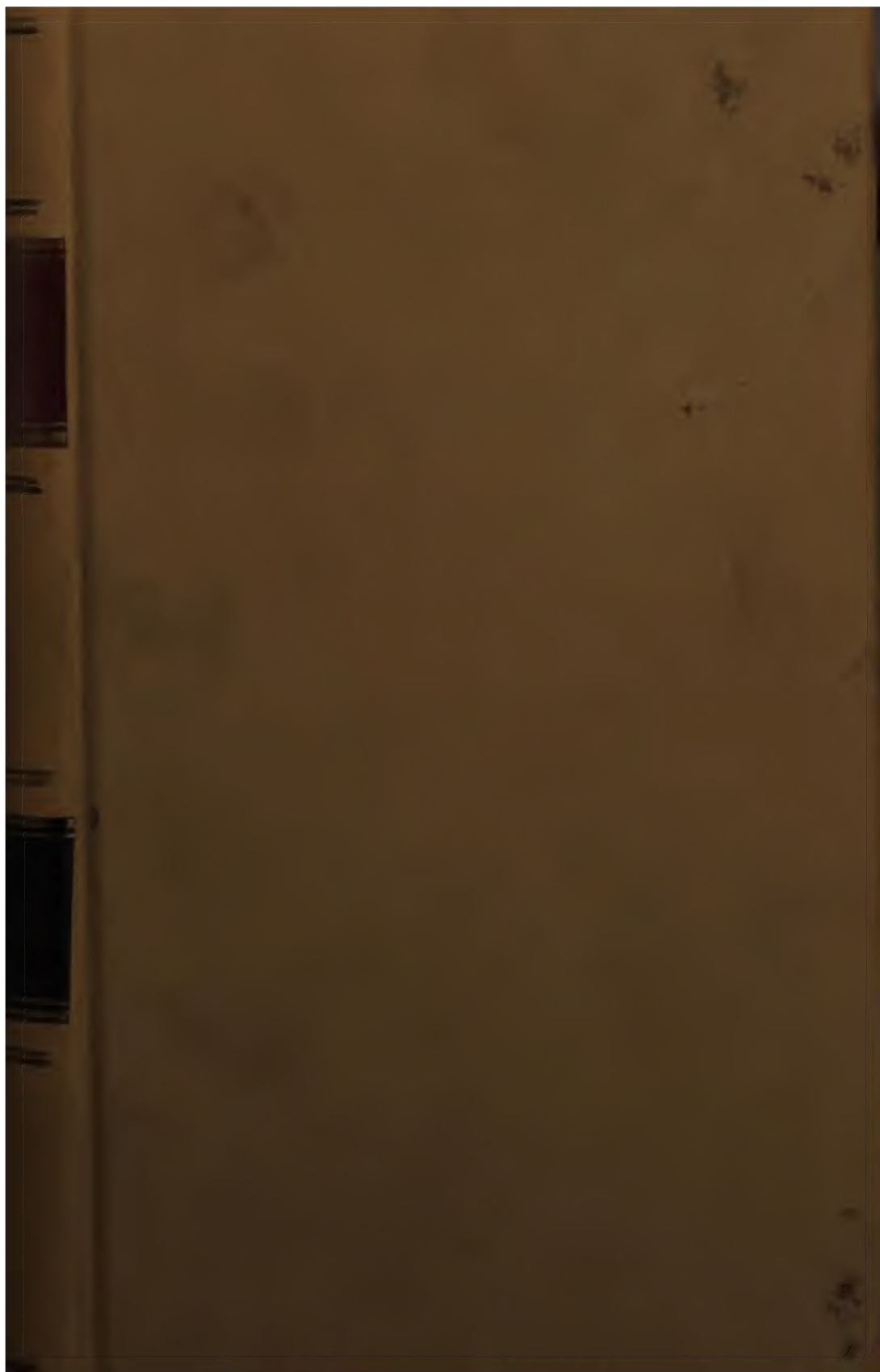
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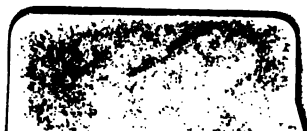
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R E P O R T S

of

C A S E S

DETERMINED IN THE

Court of Chancery

OF THE

STATE OF NEW-JERSEY.

BY HENRY W. GREEN,
REPORTER.

VOL. III.

ELIZABETH-TOWN:

PRINTED BY EDWARD SANDERSON.

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THE present volume completes the series of decisions in Chancery from Saxton's Reports down to the appointment of Chancellor under the New Constitution. The Reporter regrets that, owing to circumstances beyond his control, the cases have not been printed in chronological order. The cases contained in the second volume, and in the first one hundred and forty pages of the third volume, were decided previous to the appointment of the Reporter, and precede in order of time the cases reported in the first volume. No opinions were prepared by Chancellor SOUTHARD during the short period he was in office, and none of Chancellor SEELEY'S opinions have been furnished for publication.

TRENTON, October 20th, 1846.

CHANCELLORS OF NEW JERSEY,

**DURING THE PERIOD OF THE CHANCERY REPORTS, WITH THE DATE
OF THEIR RESPECTIVE APPOINTMENTS.**

PETER D. VROOM,	appointed	November 6, 1829.
SAMUEL L. SOUTHARD,	"	October 26, 1832.
ELIAS P. SEELEY,	"	February 27, 1833.
PETER D. VROOM,	"	October 25, 1833.
PHILEMON DICKERSON,	"	November 3, 1836.
WILLIAM PENNINGTON,	"	October 27, 1837.
DANIEL HAINES,	"	October 27, 1843.

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ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY

JANUARY TERM, 1837.

P. DICKERSON, ESQ., CHANCELLOR.

MARY O'KILL and others v. ROBERT CAMPBELL.

Upon a devise of real estate to executors in trust to permit a married daughter "to use and occupy the farm and to take the rents, issues and profits thereof to her own use during her natural life, free from any control of her present or any future husband, and not to be in any wise liable for any debt or debts he now owes, or which any future husband may hereafter contract," the court will not, upon the death of the husband, permit the trust to be set aside, or the estate to be conveyed to the *cestui que trust*.

Equity, for satisfactory, sufficient cause, will direct a change of trustees.*

Bill by *cestui que trust*, entitled to the enjoyment of real estate, and the receipt of the rents and profits for her life, and by the devisees in fee of the remainder, to set aside the trust, and to have the land conveyed by the trustee to the *cestui que trust*

* The appointment of new trustees is an ordinary remedy enforced by courts of equity in all cases where there is a failure of suitable trustees to perform the trust, either from accident, or from the refusal of the old trustees to act, or from their original or supervenient incapacity to act, or from any other cause. 2 Story's Eq. sec. 1267.

[O'Kill et al. v. Campbell.]

for life ; and if that relief be denied, then for a change of trustee—
 Answer by the trustee, being the sole defendant, admitting the
 charges in the bill, and praying to be discharged from the further—
 execution of the trust, by reason of the multiplicity of his affairs—
 the infirmities of age, &c.

Hearing on bill and answer.

Frelinghuysen, for complainants.

Defendant pro se.

THE CHANCELLOR. James Jay, deceased, by his last will and testament, dated in the year eighteen hundred and fifteen, devised certain real and personal property, in the county of Bergen, to his executors, in trust, for the use of his daughter, Mary O'Kill, one of the complainants, who at that time was wife to John O'Kill, the father of the other complainants. Robert Campbell, the defendant, is the only surviving executor and trustee named in the will. James Jay, the testator, died soon after making his will ; and about the year eighteen hundred and twenty-two, Mary O'Kill obtained a divorce from her husband, John O'Kill. All the children of Mary O'Kill are of age, and have joined as complainants in this bill, which seeks to set aside the trust altogether, and to have the estate conveyed by the defendant to Mary O'Kill, one of the complainants ; and if that relief cannot be granted, that the trustee be changed, and some other person-appointed to take charge of the estate, and execute the trusts of said will.

The defendant, in his answer, admits the facts charged in the bill, and expresses his desire to be discharged from the further execution of the trust, by reason of the multiplicity of his own private concerns, and other business, and the infirmities of age which generally accompany the decline of life.

Upon examining the will of James Jay, deceased, it appears that he has devised the property in question to the executors in trust, that they permit his daughter, Mary O'Kill, to use and

[O'Kill et al. v. Campbell.]

occupy the same, "and to take the rents, issues and profits thereof to her own use during her natural life, free from any control of her present or any future husband, and not to be any way liable for any debt or debts he now owes, or which any future husband may hereafter contract."

It is true that by the divorce of Mary O'Kill, one reason for creating this trust has ceased, but another of equal validity yet remains. The testator saw fit to guard against the control or debt of any future husband of Mrs. O'Kill; and as she is now divorced from Mr. O'Kill, the very danger anticipated by the testator exists, and I do not feel authorized to alter his will in that particular.

But the reasons assigned for changing the trustee appear to me sufficient. Therefore let it be referred to one of the masters of this court to nominate a trustee, in place of the present defendant.

Order accordingly.

The following decree was thereupon made:—

The chancellor, being of opinion that no sufficient ground appears to authorize the extinguishment of the said trust created by the last will and testament of James Jay, deceased, and being satisfied that the trustee who now holds the said real estate as the surviving executor and trustee of the said James Jay, deceased, should be changed, and a new trustee nominated and appointed: It is, on this nineteenth day of January, in the year of our Lord one thousand eight hundred and thirty-seven, by his excellency the chancellor, ordered, adjudged and decreed, that the said trustee who holds the said real estate for the use of the said Mary O'Kill, be changed; and that a new and other trustee be appointed to execute and fulfil the trust created and directed by the said last will and testament of James Jay, deceased: And it is further ordered and decreed, that the said new trustee be invested with all the powers and privileges, and subject to all the responsibilities and duties of such trustee of the said James Jay, deceased, for the use of the said Mary O'Kill;

[Mullany v. Mullany.]

and that he execute and give good and sufficient security for the performance of such trust. It is further ordered, that it be referred to one of the masters of this court to nominate and appoint such new trustee, and receive security for the faithful performance of such trust, and that he make report thereof to the court with all convenient speed.

MARY B. MULLANY et al. v. JAMES R. MULLANY et al.

A testator devised as follows:—"I do give, devise and bequeath unto my daughter Maria, the wife of J. R. M., all that farm, &c. now in the occupation and possession of the said J. R. M. To have and to hold the farm unto my said daughter M., her heirs and assigns for ever; not in any manner subject to the sale or disposal of her said husband, in any way, manner or form whatever." *Held*, that it was not the intention of the testator to exclude the husband of the devisee from his estate by curtesy in the land devised.

If a testator devise to a feme covert an estate of inheritance in fee simple, it cannot by any restriction or provision in the will deprive the husband of the devisee of his estate by the curtesy in the land devised.

Those incidents which by law are inseparably annexed to an estate, cannot be prohibited by any condition or limitation expressed in the deed or will.

A court of equity is as much bound by positive rules and general maxims concerning property as a court of law.

In giving construction to a devise, the intention of the testator should be regarded unless it be contrary to the rules of law, in which case it should be considered void as well in a court of equity as of law.

In cases of trusts executed or immediate devisees, where the trusts are direct and wholly declared by the testator to attach on the lands immediately under the will itself, the construction by courts of law and of equity should be the same.

But in cases of executory or imperfect trusts which are only directory, or prescribe the intended limitations of some future conveyance, courts of equity in striving to ascertain the intention of testators, have not adhered strictly to the rules of construction adopted by courts of law, but have directed those conveyances to be made in such manner as to carry out the intention of the testator, as ascertained from an examination of the whole will.

[Mullany v. Mullany.]

A man cannot by will create such an estate, as by the rules of the common law he could not in his life time create by deed.

Frelinghuysen, for complainants.

J. D. Miller, for defendants.

THE CHANCELLOR. In this case, the bill charges, that the complainants are the children of James R. Mullany, one of the defendants, by his late wife, Maria Mullany, deceased, who was the daughter of Elias Berger, late of the county of Bergen, deceased. That on the first of March, eighteen hundred and sixteen, the said Elias Berger made his last will and testament, and among other matters, devised as follows:—"I give and bequeath unto my daughter Maria, the wife of James R. Mullany, one other equal third part of the whole of the income arising from my estate, real and personal, to be paid to her, and to no one else, punctually, yearly and every year during the term of her natural life; which annual allowance is intended for her use, maintenance and support, and for no other purpose whatever, and is, consequently, not to be subject to the control or disposal of her husband in any respect. Then, immediately after the decease of my wife Mary, they, my aforesaid daughters Jane and Maria, shall be entitled to an equal participation of that equal third part of the income arising from my estate, real and personal, which is herein before set apart for the maintenance and support of my said wife Mary; which my executors are hereby directed to pay unto them respectively, and to no other person or persons whomsoever, yearly and every year, during the term of their natural lives, respectively, for their own use, maintenance and support, and for no other purpose whatever."

On the sixth of August, eighteen hundred and twenty-three, Elias Berger made a codicil to his will, in the following words: "I do give, devise and bequeath unto my daughter Maria, the wife of James R. Mullany, as an equivalent, or to make her equal with her sister Jane, all that certain farm, with the buildings thereon, situate at Bergen Point, in the county of Bergen,

[*Mullany v. Mullany.*]

and state of New-Jersey, now in the occupation and possession of the said James R. Mullany, which lies, &c. (describing it.) To have and to hold the same unto my said daughter Maria, her heirs and assigns, for ever; not in any manner subject to the sale or disposal of her said husband, in any way, manner or form whatever."

Elias Berger, the testator, died in October, eighteen hundred and twenty-six, leaving his said will and codicil in force; and Maria Mullany, his daughter, died in October, eighteen hundred and thirty, leaving her husband, James R. Mullany, one of the defendants, and the complainants, her heirs at law, surviving her.

There are other charges in the bill, of which it is not necessary now to take notice, as I understand that upon the demurrer filed, the only question submitted is, whether the defendant, James R. Mullany, is tenant by the curtesy of the premises described in the codicil.

The first question which presents itself, refers to the intention of the testator; whether he intended by this will to exclude the husband from the curtesy. And in order to arrive at that intention, it is proper to consider the situation of the parties at the time of making the will, and to compare expressions used in the codicil, with expressions upon similar subjects in other parts of the will.

The rule of construction upon this subject is, that as it is against common right, "the instrument under which it is made must clearly speak the devisor's intention to bar the husband, else it cannot be allowed:" *Clancy*, 262.

As to the situation of the parties, it appears by the codicil itself that the defendant, Mullany, was in the occupation and possession of the premises at the time of making the codicil; and as it appears by the bill that he was in possession after the death of his wife, I take it for granted that his possession was uninterrupted from the time of making the codicil until after the death of his wife, and that she lived with him. Under these circumstances, it cannot be presumed, unless most clearly ex-

[Mullany v. Mullany.]

pressed, that the testator intended to change the situation of the parties as to the manner of occupying and enjoying the property, after his death, which he had sanctioned for the last three years of his life, and that after the making of this codicil. Nor do I think that the words of this codicil necessarily convey that idea, and particularly when compared with other expressions used in the former part of the will. When bequeathing to Mrs. Mullany the third part of the income of his estate, both real and personal, for her life, he directs it "to be paid to her and to no one else;" and declares it to be "for her use, maintenance and support, and for no other purpose whatever," and "consequently not to be subject to the control or disposal of her said husband in any respect." But in the codicil, when devising the farm to her, the only words of limitation or restraint are, that it shall not be "subject to the sale or disposal of her husband in any way, in manner or form whatsoever."

As the defendant, Mullany, was at this time in the quiet and uninterrupted possession of the farm, with his wife and family, and as the testator in this latter devise has used the terms "sale and disposal," instead of "control and disposal," used in the former part of the will, I cannot believe that he intended to exclude him from the use and enjoyment of the farm during the life time of his wife, nor to debar him of his rights after her death. But the more reasonable construction appears to me to be, that he intended to make him use and occupy it for the benefit of himself and family, and not to sell or quit it. If he had intended to exclude or debar him from all right or interest in the real estate, it is fairly to be presumed that his terms of exclusion would have been as strong, at least, as those used with regard to the personal estate.

In the case of *Wills v. Sayers*, 4 *Mad.* 409, there was a bequest of a sum of money to a feme covert, "for her own use and benefit;" and yet the vice chancellor, sir John Leach, decreed that it was not for her "separate use," because in the same will there was a bequest to her of other monies "for her sole and separate use." There the construction given to the former ex-

[Mullany v. Mullany.]

pression was evidently controlled by the greater particularity of the latter.

But if the intention of the testator had been more clearly expressed to debar the defendant, Mullany, from his curtesy, another question arises, How far that intention shall prevail? In other words, If a man devise to a feme covert an absolute estate of inheritance in fee simple, and annex a condition which is inconsistent with the legal effect of that estate, will that condition be effectual in equity?

Upon this subject, the correct rule for the construction of wills, according to my view, is, "that such an estate, which cannot by the rules of common law be conveyed by act executed in his life time by advice of counsel learned in the law, such an estate cannot be devised by the will of a man who is intended in law to be *inops consilii*." *Corbet's case*, 1 Co. 85.

It is true that the intention of parties should be greatly regarded in giving construction both to wills and deeds; but I can see no reason why a man without the benefit of advice and counsel, should be permitted to convey an estate by will, which he could not do by deed, and with the benefit of counsel; nor can I believe that a court of equity can, consistently, dispense with or disregard those general rules of law upon which our titles depend.

In the case of *Long v. Laming*, 2 Burr, 1108, lord Mansfield says, "A court of equity is as much bound by positive rules and general maxims concerning property, (though the reason of them may have ceased,) as a court of law; and if the intention of a testator be contrary to the rules of law, it can no more take place in a court of equity than in a court of law; if the intention be illegal, it is equally void in both." And lord chancellor Cooper, in the case of *Watts v. Ball*, 1 P. W. 109, decreed, "that trust estates were governed by the same rules, and were within the same reason as legal estates, and if husband would be tenant by the curtesy at law, so in equity." And he adds, "if there were not the same rules of property in all courts, all things would be, as it were, at sea, and under the greatest uncertainty."

[Mullany v. Mullany.]

And the same principle is established in the later case of *Banks v. Sutton*, 2 P. W. 632; in which case, after stating the rule, the master of the rolls says, there is no exception to the rule, nor any reason why there should be.

And *Maddock*, in the first volume of his treatise, page 452, confirms the rule, and states the only difference to be, "that where a trust estate is created by deed or will, it is determined upon in courts of equity, and where a conveyance or devise is of a legal estate, it is determined on in courts of common law, but the decision in each court in the construction of words of limitation is guided by the same rules."

If, therefore, courts of equity are as much bound by positive rules and general maxims concerning property, as courts of law, and if the rules of construction are the same in both courts, in order to arrive at the true construction and legal effect of this will, it is proper to inquire, in the first place, as to the rule in the courts of common law.

The earliest case that I find upon the subject, is that of *Sir Anthony Mildmay*, 6 Co. 41; where, after great discussion, it was resolved, "That if a man made a gift in tail, on condition that he shall not suffer a common recovery, that condition is repugnant to the estate tail, and against law. Also if a man made a gift in tail to a feme upon condition that the husband of the tenant in tail after issue shall not be tenant by the curtesy, this condition is void."

And in a later case in seventeen hundred and ninety-eight the same doctrine is maintained. I refer to the case of *Goodill v. Brigham*, 1 Bos. and Pul. 192, where a devise was made to a feme covert in fee, with a declaration in the will, that "she might give, sell and dispose of the same, as she should think proper, and also give acquittances and other discharges, so as not to be under the control of her own husband, who should not intercede or meddle with any of the estate or effects thereby given to the said feme covert." It was unanimously ruled, "that such a power was void, as being inconsistent with the fee given to her in the first instance."

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And in this case I refer to the views of justice Buller, as particularly applicable to the present case. He says, "The deviser seems to have had two intentions, which are inconsistent; one was to give an estate in fee to the feme covert, the other to qualify it in such manner as that her husband should have no power over it. The last is contrary to the rules of law: the court will, therefore, carry into effect the first intention, and reject the other."

From these cases, which have not, to my knowledge, been overruled, I infer that those incidents which by law are inseparably annexed to an estate, cannot be prohibited by any condition or limitation expressed in the deed or will; and that when a man gives a fee simple, he has parted with all the interest which he had, and cannot be permitted to say, that such estate shall not be subject to all the restraints imposed upon it by law.

If this doctrine be correct, the defendant, Mullany, would be entitled to his curtesy in a court of law; and if the rule cited from Corbit's case be the true rule of construction, he would also be entitled in a court of equity. And upon examining the decisions in courts of equity, I think they will be found to sustain that rule.

There is a class of cases respecting the rights of married women over their separate property, and showing how far they may be considered as unmarried; but these cases apply to personal property, and the rents and profits of real estate during life, which would by law belong to the husband upon marriage.

It will be remarked, that by the will of the testator in this case, the farm is not given to the separate use of the wife during life, but it is given to her in fee; they being at the same time in the use and enjoyment of it; and the only condition or limitation annexed by the will, is, that he shall not sell or dispose of it, in any way, manner or form. I refer to this part of the case to show, that they had an actual seizin, both in fact and in law, could have sold the property and given an absolute, indefeasible title in fee to the purchaser, and the complainants must take by descent and not by purchase. In order to avoid the effect of

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marriage upon the property of the wife, resort has been had to the intervention of trustees, and courts of equity have declared that where a trust was intended and no trustee named, they would supply the deficiency, so that by operation of law trustees were raised up to support and protect the rights of those who were intended to be benefited by a devise or gift.

And if the complainants can prevail in this case, it must be upon the idea that, under this devise the husband became trustee for his wife during her life, and now for the complainants, who are her heirs at law. But it will be remarked, that if it be so, it must be a trust executed; for the testator certainly did not contemplate any further conveyance to perfect the title, and there is nothing for this court to do, in that respect, nor is there any thing asked for by the bill, which could give this the character of an executory trust.

In examining the decisions of courts of equity upon the subject, the strongest case for the complainants which I find, is that of *Bennet v. Davis*, 2 P. W. 316, where a devise of lands in fee was made to a married woman, for her separate and peculiar use, exclusive of the husband, "to hold the same to her and her heirs, and that her husband should not be tenant by the curtesy, nor have those lands in case he survived the wife, but that they should, upon the wife's death, go to the heirs." In this case the master of the rolls said it was a trust in the husband, created by the act of law and decreed that he should join in a conveyance to a trustee, for the separate use of his wife, &c. But it is to be remarked that the question arose in the life time of the wife, between her and the creditors of her husband, who had become a bankrupt, and although the court might with great propriety protect the property against the creditors of her bankrupt husband, (which is the point of the case,) it does not follow that he would have been barred of his curtesy. It is true that the master of the rolls, in delivering his opinion, remarks that "Although the husband might be tenant by the curtesy, yet he should be but a trustee for the heirs of the wife." But this is an expression not called for by the case, and therefore not entitled to much weight,

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and the operation and effect of the case should be limited to the point decided.

In the case of *Darley v. Darley*, 3 Atk. 399, which was determined a few years later, lord Hardwicke said, that where an estate is given to a husband for the use of the wife, he may be considered as a trustee for her separate use. I refer to this case because it was cited by the counsel for the complainants, but it appears to me to have no bearing upon the present case, as it applied to personal property, and the point decided was, that a father cannot apply a legacy left to a child to the maintenance of that child.

I proceed to examine those cases in equity which satisfy me that the same rules of construction should apply in courts of law and equity, and that although the intention of a testator is much regarded in courts of equity, yet that intention will not be carried out, even in those courts, if it is contrary to law.

The first case that I find upon this subject, applicable to the present, is that of *Leonard v. Sussex*, 2 Vern. 526. In that case a devise was made to trustees to convey to A. and B. and the heirs of their bodies, provided that it should not be in their power to dock the entail during their life. Decreed that they must be made only tenants for life and not have an estate tail conveyed to them, because the estate is not executed, but executory, and therefore the intent and meaning of the testatrix is to be pursued. But the court remark, "Had she by her will devised to her sons an estate tail, the law must have taken place, and they have barred their issue, notwithstanding any subsequent clause or declaration in the will that they should not have power to dock the entail." This case establishes the principle that the intention of a testator cannot prevail against the rules of law.

And five years after, lord chancellor Cowper, in *Harvey v. Harvey*, 1 P. W. 126, doubted the power of devising real estate to the wife's separate use at all, because it was repugnant. And lord chancellor Talbot, in the case of *Atkinson v. Hutchinson*, 3 P. W. 259, admitted that the devise of a trust must have the same construction as that of a legal estate; and further stated, that,

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" although the intention of the testator is greatly to be regarded, yet that his intention must ever be consistent with the rules of law."

The case of *Roberts v. Dirwell*, 1 *Atk.* 607, decided in seventeen hundred and thirty-eight, appears to me to have a strong bearing upon the question. The testator in that case directs her trustees to convey freehold lands to the feme covert during his life, so that she alone, or such person as she should appoint, should take and receive the rents and profits thereof, and so as her husband is not to intermeddle therewith. The question was, whether this was a trust executed or executory; for if executed, then feme was tenant in tail and husband would have his curtesy, but otherwise if executory. Lord Hardwicke was of the opinion, that conveying an estate tail would defeat the intention of the testator; and he remarks, "that if the wife had been entitled to an estate tail, I do not see but the husband must have been tenant by the curtesy." And as to the question whether the devise to her separate use will bar the husband, he says, "I am of opinion it will not, because here is a sort of seizin in the wife." This case sustains the rule, that the intention must be in conformity with the rules of law, and at the same time points out the distinction between executory and executed trusts. And the case of *Hearle v. Greenbank*, 3 *Atk.* 695, decided by the same chancellor eleven years later, establishes the same principle, although in some points the opinion of the chancellor in the two last cases appears to have varied.

But the subject was again brought before lord chancellor Talbot a few years after, in the case of *Lord Glenorchy v. Bosville*, Tal. Eq. 19, when the court expressly declared, that where an express estate tail is devised, the annexing a power inconsistent with it will not defeat the estate, but the power shall be void; and the lord chancellor remarks, "That in cases of trusts executed or immediate devises, the construction of the courts of law and equity ought to be the same, for there the testator does not suppose any other conveyance will be made. But in executory trusts he leaves something to be done; the trusts to be executed in a more careful and more accurate manner."

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And in the case of *Austin v. Taylor*, *Amb.* 376, the lord keeper was of opinion, that in the case of imperfect trusts only the court could make a different construction from a legal limitation. In that case he said, "there was no reference to the trustees; without that ingredient he did not find any case where the court had given a different meaning from what a court of law would on a legal limitation."

But the case of *Morgan v. Morgan*, reported in 5 *Mad.* 408, is a strong case in support of the view I have taken, and has a striking resemblance to the principal case. It was a case between the father who claimed as tenant by the curtesy, and the son who claimed as heir at law to his mother. The lands in question had been the estate of the mother, and previous to her marriage were conveyed to trustees upon trust, "for the sole and separate use of the (wife) mother for life, with power to the mother to appoint the fee by deed or will, and for want of appointment in trust for the mother, her heirs and assigns."

The mother died without having made an appointment, leaving her husband and son; of course she took an equitable estate of inheritance. After an argument where all the leading cases upon the subject were cited, the vice chancellor, sir John Leach, decided that the husband was entitled to his curtesy, and observed, "that at law, the husband is entitled to the curtesy whenever the wife, during the coverture, is seized of an estate of inheritance, and has issue by the husband capable of that inheritance, and that equity follows the law in the quality of estates."

The vice chancellor also alludes to the cases of *Hearle v. Greenbank* and *Roberts v. Dixwell*, and remarks, "that as the opinions of lord Hardwicke in those two cases cannot be reconciled, he has recourse to principle and analogy."

He also distinguishes the case of *Bennet v. Davis* from that of *Morgan v. Morgan*, by stating, "that in the latter case the husband is partially and not wholly excluded from the enjoyment of the wife's property;" and remarks, "that the court would have restrained him from all interference with the rents

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and profits during the life of the wife, but there being no further exclusion expressed in the settlement, the court can have no authority to restrain him from the enjoyment of his general right as tenant by the curtesy in the equitable inheritance of the wife.'

These latter remarks apply with equal force to the case before the court, for the words used in the settlement in the one case, are the same as those used in the will in the other.

I find the same doctrine sanctioned by the authority of Mr. Clancy, in his treatise on the rights of women. In page 282, he says, "that if an estate of freehold be limited to trustees for the sole and separate use of a married woman and her heirs, although such a limitation would entitle her to the rents and profits during the marriage, and would enable her to dispose of them as she thought fit, yet she could not, without the concurrence of her husband, dispose of the reversion, nor could she bar him of his tenancy by the curtesy, if the estate were of inheritance."

This same subject has recently passed under the scrutinizing eye of our late chancellor Williamson, in the case of *Gibbons v. Trumbull*; and if, in that case, I could find any thing conflicting with the views I have taken of this, I should have paused before adopting those views; but I am sustained by that case, as far as it is applicable to this.

When treating of the right of Mr. Trumbull as tenant by the curtesy, he remarks, "that at law, to entitle the husband to be tenant by the curtesy, marriage, seizin of the wife, issue, and death of the wife, are necessary requisites; and the construction of trusts being the same in equity as that of legal estates in courts of law, therefore, to entitle the husband to be tenant by the curtesy of a trust estate, there must be the same requisites." And he decides against the claim of the husband expressly upon the ground of want of seizin.

From a review of all the cases, I conclude that a court of equity is as much bound by positive rules and general maxims concerning property, as a court of law.

That in giving construction to a devise, the intention of the testator shall be regarded, unless it be contrary to the rules of law,

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in which case it should be considered void, as well in a court of equity as of law.

That in cases of trusts executed, or immediate devisees, where the trusts are directly and wholly declared by the testator to attach on the lands immediately under the will itself, the construction of the courts of law and equity should be the same.

But in cases of executory or imperfect trusts, which are only directory, or prescribe the intended limitations of some future conveyance, courts of equity in striving to ascertain the intention of testators, have not adhered so strictly to the rules of construction adopted by the courts of law, but have directed those conveyances to be made in such manner as to carry out the intention of the testators, as ascertained from an examination of the whole will.

And that a man cannot by will create such an estate, as by the rules of the common law he could not, in his life time, create by deed.

And I adopt these conclusions, not only because they appear to me to be fairly drawn from the cases, but because they are in conformity with the dictates of my own judgment.

And as Mrs. Mullany was seized of an estate of inheritance in the premises in dispute during the coverture, and had issue capable of inheriting, and who now claim the inheritance, I am of opinion that at her death Mr. Mullany became tenant by the curtesy of those premises, notwithstanding the words of restraint or limitation in the will, under which she derived her title.

NATHANIEL WRIGHT, Executor of BENJAMIN WRIGHT, v.
ELIJAH WRIGHT and others.

A testator by his will directed that when his youngest child attained the age of twenty-one years, all his real estate should be sold or divided, whichever a majority of his children then living should think best, and invested his executors, and the survivor of them, with full power and authority to sell either at public or private sale, as to them might seem most advantageous,

not alter his determination without giving the heirs an opportunity of
their decision upon the question of sale or division.

filler, for complainant.

ts, for defendants.

CHANCELLOR. In this case, the material facts charged
ill are, that Benjamin Wright, late of Hunterdon county,
or about February ninth, eighteen hundred and twenty-
ving fourteen children, to wit, Mary wife of James Coorah,
Margaret, Benjamin, Nathaniel, Hannah wife of
lettler, Ann wife of Nathan Dawes, David, Francis Q.,
Rachel wife of William R. Seigle, Catharine wife of
Conover, John A. and Reuben, and also leaving a wi-
hat said Benjamin Wright had considerable real and per-
state, and by his last will and testament, among other
he did devise as follows: "It is my will that when my
st child living is twenty-one years of age, all of my real
hall either be sold or divided, whichever a majority of
dren then living shall think best, and with regard to the
tion in either case, my sons shall take two shares and my
ers one share." "Sixth and lastly, I constitute and ap-
y sons Nathaniel and David Wright, executors of this

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&c. That the will was proved by complainant, on the twenty-third of February, eighteen hundred and twenty-six, and that David Wright, the other executor named, at that time refused to act or prove the will. That complainant acted as sole executor, letting out the property, &c., until February, eighteen hundred and thirty-three, when Reuben, the youngest child, came of age; when he called a meeting of the children to ascertain their wishes as to the disposition of the real estate, which consisted of a farm of about two hundred and fifty-six acres.

All the children attended except Margaret, who authorized James Cooley to appear and say for her, and except Catharine and her husband, David Conover. They unanimously agreed that it was better to sell the farm.

Accordingly, in October, eighteen hundred and thirty-three, the complainant, as acting executor, advertised the farm in hand-bills and public paper for sale, with a memorandum at the bottom of the advertisement, in these words: "N. B. If the above property is not sold by the tenth day of December next, it will, on that day, be offered at public sale."

That these bills were put up generally, and as he believes, known to all the children who lived in the neighborhood, and he heard no objection. That James Cooley, the husband of Mary, since that time sold his right, (one twentieth,) to Elijah Wright, for three hundred dollars; and that Margaret, John Mettler husband of Hannah, and Nathan Dawes husband of Nancy, offered and were willing to sell their several shares at the same rate, which would put the farm at the value of six thousand dollars. That the widow still lives and has her dower. That a few days before the tenth of December, eighteen hundred and thirty-three, when the farm was to be sold at public sale, he entered into a written agreement to sell it to Peter Alpaugh, for seven thousand dollars, which was the best price he could get and that Alpaugh was able to pay, &c.; and on the thirty-first of December, eighteen hundred and thirty-three, he conveyed the farm to him, and received his two equal bonds, with personal security, the one payable April first, eighteen hundred and thirty

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four, the other, April first, eighteen hundred and thirty-five, both without interest, and agreed to put him in possession on the first of April, eighteen hundred and thirty-four. The deed was delivered and recorded. That on the seventeenth of January, eighteen hundred and thirty-four, David Wright, the other person named as executor, proved the will, but gave no notice of his intention, or that he had proved it.

That Elijah and complainant are in possession of the farm, and notwithstanding the sale, the other children, since Reuben came of age, claim the right to the farm, &c., and refuse to permit the sale to go into effect, and keep Alpaugh out of possession, and refuse to confirm the sale, and deny the right of complainant to make the sale.

That the children, or some of them, in May, eighteen hundred and thirty-four, applied for commissioners to divide the farm, and the court appointed them, and they were proceeding to divide, &c., notwithstanding noticed by the complainant of the sale, &c. By these means the complainant is hindered in executing his duty as executor, in perfecting sale to Alpaugh, &c., who is ready to pay the seven thousand dollars, according to agreement. That the sum of seven thousand dollars is a full consideration for the farm, and that the price has depreciated since the sale.

Upon these facts the complainant prays that the sale to Alpaugh may be carried into effect, and the possession of the farm yielded up to him. That the proceedings of the children, at law, for division or re-sale, and the proceedings of the commissioners, may be restrained, &c., and for general relief.

Upon filing this bill, an injunction was issued according to its prayer.

To this bill an answer was filed by the defendants, Benjamin, David, Elijah, John A., Francis Q., John Mettler, and William R. Seigle and Rachel his wife; in which they admit that they had a meeting for the purpose of deciding upon the manner of disposing of the farm, as set forth by the complainant, and that they agreed that it should be sold; but they deny that they or either of them agreed that it should be sold at private sale, and

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state that it was upon that occasion unanimously agreed, as well by complainant as the others, that if they agreed to sell, it should be a public sale, to the highest bidder, unless they agreed to sell to one of the heirs, and that they would not have agreed to any sale except public. They admit that it was advertised as stated in the bill.

But Francis Q. Wright, in answering for himself, says, "that when he saw the advertisements, he objected to them to the complainant, because they were in violation of the agreement, &c. That complainant told him that he advertised in that form in order to make some arrangement on a river lot, which he held for a term of years yet to come from the testator; but he, the complainant, did not pretend to have a right to sell at private sale, &c.

And Elijah Wright, in answering for himself, says, "that four or five days before the sale to Alpaugh, he called upon the complainant, and had a conversation upon the subject, when the complainant assured him that he would not sell the place at private sale, but would sell at public sale, according to the agreement."

And John A. Wright, in answering for himself, says, "that he resided in Warren county, and after the farm had been advertised, he heard that complainant intended to sell it at private sale, and some time before the day fixed for the public sale, he went down to see the complainant upon the subject, when the complainant assured him that the property should be sold at public sale upon the day mentioned in the notice."

And Francis Q. Wright says that he was present at the same time, and heard the complainant make the assurance.

The defendants further admit, that the complainant made the sale to Alpaugh, as set forth, but deny that they or either of them had any notice of it until after it was closed.

David Wright, for himself, admits that he proved the will as stated in the bill, but denies that he ever refused to take upon himself the execution; that he only omitted and neglected so to do. That he proved the will by request of defendants, to prevent

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the execution of sale to Alpaugh, which was made in violation of the agreement, &c.

They deny that the property has depreciated in price, but allege that it was sold much too low, and since, it has advanced in price, &c. That on the third of May, eighteen hundred and thirty-four, a majority of defendants, to wit, Benjamin, John Mettler and wife, Nathan Dawes and wife, Francis Q. Wright, Elijah, David Conover and wife, John A. Wright, Reuben Wright, and William R. Seigle and wife, by writing under seal, did determine to have the farm divided, &c., and commissioners were appointed; and the defendants pray that the injunction may be dissolved.

In examining this case, I have not found it necessary to consider whether the neglect of David Wright to prove the will of his father, under the circumstances, amounted to a renunciation, nor whether the complainant, according to the allegations of his own bill, has not an adequate remedy at law, nor whether Alpaugh has acquired any rights by his purchase which would be protected by this court. He is no party to the bill, and cannot be bound by any decree that may be made.

According to the true construction of the will of Benjamin Wright, deceased, it is evident that he intended that his executor, or such one as took upon himself the execution of the will, should have authority to sell either at public or private sale, provided it was determined to sell the property; but it is equally evident, that the devisees, or a majority of them, had the right to determine whether the property should be sold at all, or divided. And before determining that point, they had a right to call upon the executor to determine as to the course he would pursue in case they concluded to sell. And the executor had a full right at that time to determine whether he would sell at public or private sale; and if he did then determine, and the other devisees were influenced by that determination, in making their election to have the property sold, the executor could not alter that determination, without giving the heirs an opportunity of altering their determination upon the question whether it should be sold or divided. It, there-

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fore, becomes necessary to inquire whether in point of fact the complainant did determine the manner in which he would sell before the devisees elected to have it sold ; and if so, whether it had any influence in their electing to have it sold.

Before examining the evidence upon this subject, I advert to some facts in the case, which are not controverted, and which have had an influence upon my mind. It appears by the testimony, that the executor (complainant) sold the farm to Alpaugh on the sixth of December, eighteen hundred and thirty-three, which was but four days before the day fixed by the advertisement for the public sale. And there is no evidence or allegation that any of the defendants had any notice of the sale, until after the agreement for that purpose was executed. Even Elizabeth Alpaugh, the complainant's witness, who lived with him during all this time, and is the niece of the complainant, and of Alpaugh, in her testimony says, "She did not know that her uncle Peter was going to buy this property, before he had bought it. Never heard any conversation at her uncle's about his buying it, before he did buy it. She first heard that her uncle Alpaugh had bought the property, at her uncle Nathaniel's, the next day after it had been sold," &c. By this testimony, connected with the other facts of the case, it would appear that the sale was not only private, but secret.

A proper regard for the rights and interests of his co-devisees, and a just sense of his duty as trustee, would have dictated to him the propriety of giving them notice that he had received this offer, and of his intention to sell, even if there had been no question as to his authority to sell at private sale.

But I observe further, that by the terms of this agreement, which is dated the sixth of December, eighteen hundred and thirty-three, it is provided that the said Peter Alpaugh, was to pay one half of the consideration on the first of April then next, when he was to receive the deed, and take possession of the premises, and the balance on the first of April, eighteen hundred and thirty-five, and in the mean time, to secure the payment of

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that balance by bond and mortgage on the place, or by other satisfactory security.

Yet, soon after ascertaining that the other parties in interest were about to resist the sale, he executed and delivered a deed for the property, without waiting for the time specified in the agreement for that purpose, and without receiving any part of the consideration, or delivering the possession of the premises to the purchaser. It is true, that the complainant, in his answer to the interrogatory of the defendants upon that subject, says, that he took advice of counsel, "to know in what way he could proceed so as to be able to fulfil his contract and avoid being brought into difficulty," &c. Thus it appears that his only object was to fulfil the contract without getting into difficulty. Possibly, if he had asked advice as to the propriety of executing the contract, under the circumstances, he might have been differently advised : at all events, the fact shows that he gave the deed, under full knowledge of the objections. But as to the question of fact, whether the complainant did determine to sell at public auction before the devisees elected to have it sold, an inspection of the evidence, to my mind, removes all reasonable doubts. In confirmation of the answer of the defendants upon this point, Nathan Dawes and Reuben Wright both testify, that they were present at the meeting called to decide whether the farm should be sold or divided, and upon that occasion, before electing whether to divide or sell, it was expressly agreed by all the heirs present, including the complainant, that if they elected to have it sold, it should be sold at public auction, and that the election to sell, was made under that agreement. John R. James, jr. testifies, that in a conversation between the complainant and Elijah, about the value of the farm, some time before the sale, complainant said he would sell it in two or three parcels, and he understood that he would sell it at public sale. And James Cooley, the witness of complainant, although he says that at the meeting he thinks that the talk about selling at public or private sale was not until after they had agreed to sell, and when they broke up he did not think they had come to any conclusion how it should be sold, yet, upon his cross-ex-

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amination, he says, "that after the heirs had agreed to sell, it appeared to witness that the major part of them wished a public sale. Did not hear any one of them object to a public sale. It was the impression of witness, that at that time the heirs unanimously made choice of a public sale." The weight of this evidence cannot be shaken in the least, by the negative testimony of Elizabeth Alpaugh, who was in an adjoining room during this meeting, with the door open between them, and swears that she was attending to and heard what was passing, but did not hear any thing said about a public or private sale.

As this cause was submitted without argument, I do not know the ground upon which the complainant principally relies to support his case; but from the course of the examination of the witnesses, some reliance appears to have been placed upon the fact that the advertisement contemplated a private or public sale, at the election of the complainant. There might have been some force in an argument deduced from this fact, if it had passed without remark; but it appears by the testimony of several witnesses, that this form of advertisement was objected to by some of the other heirs, as being contrary to the agreement to sell at public auction; and that the complainant explained it by stating that he wished to try which way it would do best, which was sufficient to quiet their fears that he might sell it at private sale without their knowledge.

There is some evidence, also, to shew that the farm was sold for its full value, but upon this point there is evidence on both sides, and it is too vague and uncertain to establish a sale upon that ground, in opposition to the wishes of those owning four fifth parts of the property, and in violation of the agreement. If the complainant has any rights in this matter, he must seek them in the courts of law, for I find no facts in his case that entitle him to the aid of a court of equity.

Let the bill be dismissed with costs.

MARY BERRIEN V. PETER BERRIEN.

- W**here a testator, by his will, directs that the residuum of his estate, real and personal, shall be sold by his executors, and the moneys arising from the sale be divided among his children in a different ratio from that in which the land would have descended, the devisees take a vested interest in the proceeds of the sale of the estate, both real and personal, and the executors are bound to make sale according to the directions of the will.
- I**f no sale be made by the executors, a son of the testator does not become seized of such an estate in the land as will entitle his widow to dower.*

S. Scudder, for complainant.

J. S. Green, for defendant.

THE CHANCELLOR. The case made by the bill of complaint is as follows: Peter Berrien being seized of the premises in question, on the thirty-first of May, seventeen hundred and eighty, made his will, appointing his sons, Henry Berrien and John Berrien, his executors. After making provision for his wife, and giving some pecuniary legacies to his children, he devises as follows: "But it is also my will that the residue of my estate, both real and personal, be sold by my executors, and that the money or moneys arising from said sale, after the above mentioned legacies are paid, be equally divided among my four children, Henry Berrien, John Berrien, Sarah Berrien and Ann Berrien, and my grandson, Isaac Van Dyke."

Peter Berrien, the testator, died the same year, seized of the premises, and leaving this will in force.

In seventeen hundred and eighty-nine, the complainant married John Berrien, one of the sons of the testator, and lived with him until April, seventeen hundred and ninety, when he died, without issue. During the life time of John Berrien, he lived with his father on the farm.

* See *Herbert v. Tuthill's Ex'r*, *Saxton*, 141; *Gest v. Flock*, 1 *Green's Chas.* 106.

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Henry and John proved the will, and administered the personal estate, but never sold the land during the life of John. The complainant alleges that she does not know whether Henry afterwards sold the land, but insists that if he did, the sale was void, because a surviving executor could not sell lands, and that he did not sell so as to divest John of his seizin therein.

The bill further charges, that shortly after the death of John, Henry took possession of all the lands and rented them out, and got possession of the title deeds, and kept possession of the lands until his death, which happened a number of years after the death of John.

Peter Berrien, the defendant, is the son of Henry, and is now in possession of the premises, the title to which he claims by several conveyances from the heirs of Henry.

To this bill the defendant demurred, and assigns as grounds of demurrer; First, want of jurisdiction; Second, because it appears by the bill, that the complainant claims her dower by virtue of a title derived under the will of Peter Berrien, to her husband, when it is evident from the devise that he took no such estate under the will as to entitle her to dower.*

From the view which I take of this case, it becomes unnecessary to notice the first cause of demurrer; and as to the second cause assigned, it is proper in the first place to inquire into the relative rights and duties of the parties at the time of the death of the testator.

He directs his executors to sell the residue of his estate, both real and personal, and after paying his legacies, to divide the proceeds equally among his children, and one grand-child. As he had but two sons, who by descent would at that time have taken each two shares to one share for a daughter, it

* It appears by the pleadings on file, that the complainant claimed that title became vested in her husband, John Berrien, by descent from his father, Peter Berrien; and the reason assigned for demurrer is, that the complainant claims dower in the land "as having descended to her husband, John Berrien, from his father, Peter Berrien, when it is manifest from the will of the said Peter Berrien, as set forth in the bill of the complainant, that no such descent of lands took place."

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was evidently the intention to break the descent and divide the property equally. By this devise the devisees severally took a vested interest in the one-fifth part of the proceeds of the sale of the estate both real and personal; and the executors, as trustees, were bound to make sale and division according to the direction of the will.

In the case of *Herbert v. Tuthill's Ex'r, Saxton*, 141, the testator devised that all the rest of his estate, real and personal, be sold by his executors and turned into money, as soon after his decease as conveniently might be, and distributed among his children in the following proportions, viz. two shares to each of his sons, and one share to each of his daughters. It was held that upon the death of the testator, the children took a vested interest, and the court say, the payment of the distributive shares could not be made until after the land was sold, "but that does in no wise affect the vesting of the estate."

Now, for the purpose of illustration, let it be supposed that John Berrien had been married at the time of the death of the testator, and that he and Henry had sold the premises by virtue of the directions contained in the will; would his widow, in case of his death, have been entitled to her dower in any part of the premises sold? This I think will not be seriously contended: he would have no such seizin of an estate of inheritance as is contemplated in our act, to justify the claim of dower. He is the mere agent or trustee to carry into effect the object of the testator, and has no right in the land, except such as is necessary to carry that intention into effect.

In the case of *Hayford v. Benlows, Ambler*, 582, lord chancellor Cowper says, that, "lands devised to be sold and turned into money, must in equity be looked upon as money, and shall be looked upon as if the testator had sold it in his life time and turned it into money."

But by the bill it appears that these two executors did not sell the land at all; that if it was sold, it was after the death of John, by the surviving executor; and the complainant insists

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that the surviving executor had no authority to sell, and that if he did so, his act is void.

This subject was fully discussed in the case of *Osgood v. Franklin*, 2 *John. Chan. R.* 19, in which chancellor Kent says, "According to the settled practice of the court, the trust does not become extinct by the death of one of the trustees; it will be continued in the survivor, and cannot be permitted in any event to fail for want of a trustee." And he further remarks, "that the intention of the testator is much regarded in the construction of these powers." The same doctrine is sustained by the supreme court of this state, in the case of *Corlies v. Little*, 2 *Green*, 384.

Therefore, if Henry Berrien, the surviving trustee, sold this property, I am of opinion that he had a right to do so; and if he did not sell it, he might have been compelled to do it by any one of the parties in interest; and it is very difficult to believe, at this late period, that this property was not sold by Henry, and the proceeds properly distributed. The bill does not deny that it was so sold by Henry. I do not, however, think it necessary to resort to this presumption, in order to avoid the claim of the widow in this case. She is now, after the lapse of about forty-six years, for the first time claiming her right of dower in these premises, and asking the aid of this court in that respect. The court cannot think her claim strengthened by the lapse of time, nor by the neglect of her husband to perform the trust reposed in him by the will. It is considered more consistent with authority and with the equity of the case, to adopt the principle laid down by lord chancellor Thurlow, in 1 *Vesey*, 366, 367, where he says, "I should not inquire when real estate might be sold with all possible diligence, for it might be the very next day, or that very evening, and therefore the court always, in such a case, consider it as sold the moment the testator is dead; for where there is a trust, that is always considered here as done, which is ordered to be done, and the court cannot measure the time."

The same doctrine is sustained in the case of *Craig v. Les-*

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lie, 3 *Wheaton*, 563, where all the authorities upon the subject are collected. Justice Washington, in that case, states the principle upon which the whole of the doctrine is founded, to be, "that a court of equity, regarding the substance and not the mere forms and circumstances of agreements and other instruments, consider things directed or agreed to be done as having been actually performed, where nothing has intervened which ought to prevent a performance."

In this case, what has intervened which should have prevented the execution of the trust? Nothing is alleged in the bill, and it would be a violent presumption to suppose that the two daughters and one grand-son, would have surrendered their rights under the devise in the will, which were that each should have one fifth part of the residue of the estate, for the one seventh part to which they would have been entitled by descent.

I am therefore of opinion, that the complainant is not entitled to her dower, and that the demurrer is well taken.

Decree accordingly.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY.

APRIL TERM, 1837.

ABRAHAM ANTONIDAS v. WARREN WALLING and Wife.

The guardian of an infant cannot convey the real estate of his ward, without the authority of a court of equity; nor will the court sustain such conveyance, made either by the infant or his guardian, though the infant have received the consideration of the conveyance.

But in the absence of fraud, the infant will be decreed, upon recovering the land, to refund the consideration money, together with the value of the improvements on the land, arising from repairs of the buildings and fences and manuring the land, though he will not be decreed to allow the value of new buildings or other permanent improvements.

Randolph, for complainant.

Dayton, for defendants.

THE CHANCELLOR. By the pleadings in this case it appears, that Lydia the wife of the defendant, is the natural daughter of the late John Crawford, deceased; that she was acknowledged by him, and lived with him until the time of his death; that when she was quite young he conveyed to her a farm, consisting of about thirty-seven acres of land, which is now the subject matter of controversy; that on the thirty-

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August, in the year eighteen hundred and thirty-three, Crawford, together with his said daughter Lydia, conveyed the premises in question to the complainant, for the sum of one hundred and seventy-five dollars, which was paid over to her, she then being under the age of sixteen years. The complainant had to resort to legal proceedings to get possession of the premises, which were then in the possession of a tenant, and by expending thirty dollars or upward he obtained possession and went on to improve the premises to a considerable extent; that in the spring of the year eighteen hundred and thirty-four, the complainant was informed that (by reason of the defect of the grantor, Lydia,) his title was not good. He then procured of Crawford a bond of indemnity, to secure him against damages which he might sustain by reason of the defect of title. Soon after, Mr. Crawford died, and after his death the defendant, Warren Walling, intermarried with the said Lydia, and commenced an action of ejectment to recover the possession of the premises; and this bill was filed by the complainant, to enjoin the defendants from further prosecuting their ejectment, and to annul the deed made by Crawford and Lydia his daughter, the complainant.

The above stated facts are not controverted; and I am of opinion, that upon this state of the case the injunction should be dissolved and the deed declared void.

The strongest case in support of the deed, is that of *Inwood v. Amb.* 419, where the lord chancellor Hardwicke says, "guardians and trustees may change the nature of infants' conduct under particular circumstances, and the court would support their conduct if the court would do it under the same circumstances; they cannot do it wantonly, but where it is manifestly for the convenience of the infant."

Under the principle established in this case, the deed should be set aside, for it was certainly not "manifestly for the convenience of the infant."

Chancellor Kent, in the case of *Genet v. Tallmadge*, 1 *Jan. R.*, 564, says, "that it is not the general policy of

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the law that any guardian should have it in his power, under any circumstances, to dissipate the real estate of his ward; the law never allows him any further control than over the rents and profits."

And in the later case of *Field v. Schiefelin*, 7 John. Chan. R. 154, the same chancellor says, "the guardian in: charge of the real estate may lease it in his own name, and dispose of it during the guardianship, (and the chancery guardian has equal authority,) though he cannot convey it absolutely without the special authority of this court, because the nature of the trust does not require it."

With this view of the case it is unnecessary to inquire into rights and duties growing out of the peculiar relation existing between Crawford and the present wife of the defendant; nor is it necessary to inquire under what circumstances a court of equity would direct the real estate of an infant to be converted into personal.

But as there is in this case no fraud alleged or pretended, it would be palpably unjust, and contrary to equity and the decisions of courts of equity, that the defendants should have the land and the price of it besides.

This deed must therefore be set aside upon fair and equitable terms, and in such manner as to restore the parties to their former property and rights as nearly as it can be done.

If this had been a very recent transaction, and the complainant had neither used nor improved the farm, justice would be done by restoring to him the consideration paid by him. But in this case the defendants have had the use of the money and the complainant has had the use of the farm and made improvements thereon, by reason of which, it becomes more difficult to apply the rule in such manner as to do justice to all parties.

Upon examining the testimony in the case, I find great contrariety and uncertainty as to the value of the improvements put upon the premises by the complainant, and also as to the annual value thereof; but it is very evident that the farm at

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At the time of the purchase by the complainant, was in a bad state of cultivation, and that by a judicious course of husbandry he has very much improved its condition; and although the testimony upon the subject is certainly not very conclusive and satisfactory, yet I conclude that by reason of the manner of cultivation, by putting on manure, making and repairing fences, &c., the place has been improved in value to an amount equal to the interest of the money paid for the farm; and I am therefore of opinion that the defendants, upon receiving the possession of the farm, should refund to the complainant the amount paid, with interest thereon from the date of the deed. The claim of the complainant to be allowed for the rise in the value of the property cannot be allowed; nor am I willing to sanction the principle that he shall be allowed for any permanent improvements which he may have made upon the premises, other than such improvement as arises from a prudent and judicious management of the farm, by repairing the fences and buildings and manuring the land; and if from the impoverished state of the land and dilapidated state of the fences and buildings, such rise of management shall add to the actual value of the premises, without at the same time being of benefit to the tenant, it is but just and reasonable that he should be allowed for it; but a claim for permanent improvements, such as building houses, &c., is liable to the same objections which have ever induced courts of equity to disallow similar claims of mortgagees in possession of the mortgaged premises.

Let it be referred to a master to ascertain the amount paid, with interest. Further directions are reserved until the coming in of master's report.

Order accordingly.

The EXECUTORS of JOHN BRAY, deceased, v. JOACHIM
HARTOUGH and Wife.

If the defendant by his answer admits the existence of the mortgage sought to be foreclosed, but seeks to avoid it, the matter alleged by way of avoidance must be sustained by evidence independent of the answer.

Blauvelt, for complainants.

Nevius, for defendants.

THE CHANCELLOR. The bill charges, that the defendants gave to John Bray, in his life time, four several mortgages;—the first, for three hundred dollars, dated April the seventh, eighteen hundred and twenty-three; the second, for two hundred and eighty dollars, dated April the eighth, eighteen hundred and twenty-four; the third, for three hundred dollars, dated March the thirtieth, eighteen hundred and twenty-seven; the fourth, for nineteen hundred and six dollars, dated April the fourth, eighteen hundred and thirty-two. That they are all due and unpaid; and prays a foreclosure and sale of the mortgaged premises.

The answer admits the execution of the said several bonds and mortgages, but charges that the last bond and mortgage, for nineteen hundred and six dollars, included the other three, and that they were in fact paid off by it, but were left in the hands of the testator, John Bray, as collateral security, and that the defendants owe only nineteen hundred and six dollars, the amount secured by the last mortgage, with interest.

No evidence has been offered except the original bonds and mortgages; and the question submitted is, whether the answer of the defendants, expressly charging that the last bond of nineteen hundred and six dollars was given to take up the first three, shall prevail against the production, and proof of the execution, of those bonds and mortgages.

It is evident from a statement of the case, that this allegation of the defendants is an affirmative proposition, which, according

[Extra of *Bray v. Hartough.*]

to the principle and the practice in courts of equity, they are bound to prove, independent of their answer. If the defendants had denied the execution of the first three bonds and mortgages, the complainants must have proved them; but as they admit their execution, and seek to avoid them, the proof is on their part as to the matter of avoidance. See the case of *Hart v. Ten Eyck*, 2 *John. Chan. R.* 90—92.

Let it be referred to a master to report the amount due.

Order accordingly.

JOSHUA P. BROWNING v. The CAMDEN AND WOODBURY RAILROAD AND TRANSPORTATION COMPANY et al.

By the eighth section of the charter of "The Camden and Woodbury Railroad and Transportation Company," it is provided "that the said corporation shall pay or make tender of payment of all damages for the occupancy of the lands through which the said road may be laid out, before the said company, or any person in their employ, shall enter upon or break ground in the premises, except for the purpose of surveying said route, unless the consent of the owner or owners of such land be first had and obtained."

By the ninth section of the charter it is further provided, "that in case the company and the owners of land cannot agree as to the price, commissioners shall be appointed to assess the value of the said land, and the damages sustained by the owner; and if either party shall feel aggrieved by the decision of the commissioners, such party may appeal to the court of common pleas of the county, who shall have power to hear and adjudge the same, and if required to award a venire for a jury before them to hear and finally determine the same."

Held, that if the value of the land and damages be ascertained by commissioners, and an appeal be taken from their decision, the company cannot, pending the appeal, by tendering the amount awarded by the commissioners, acquire a right to enter upon the land, except for the purpose of surveying the route.

The right to appeal from the decision of the commissioners is unconditional, and requires no cause to be shown.

The very act of appealing, sets aside the report of the commissioners, and

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the question of the value of the land and damages is thereby left entirely open.

By the term *occupancy*, in the eighth section, is meant all the right or interest which the company could acquire in the land for the purposes contemplated by the act.

If the company claim a right to enter upon land under color of law, without having complied with the requirements of that law, a court of equity will restrain their entry by injunction.

BILL for injunction and relief, filed February eighth, eighteen hundred and thirty-seven. The bill states, that the complainant is the owner, and seized and possessed in fee simple, of a valuable farm situate in the township of Union, in the county of Gloucester and state of New Jersey, and that he has been seized and possessed thereof for five years last past, residing upon and cultivating the farm as his own; that the land of said farm is principally arable land of a very superior quality, on which the complainant has within a few years planted and reared at great expense, a large and valuable peach orchard, which is now in a healthy state and in full bearing; that on or about the first day of March, eighteen hundred and thirty-six, the legislature of the state of New-Jersey passed an act of incorporation entitled, "An act to incorporate the Camden and Woodbury Railroad and Transportation Company;" whereby J. P. B. and eleven others, and such other persons as might thereafter be associated with them, were constituted a body corporate and politic, and made capable among other things of purchasing, holding and conveying any lands and tenements, goods and chattels whatsoever, necessary or expedient for the objects of their incorporation; and that the company had been duly organized, pursuant to the requirements of the act of incorporation.

The bill further charges, that in and by the eighth section of the said act of incorporation, the president and directors of the company are authorized and invested with all the rights and powers necessary and expedient to survey, lay out and construct a railroad, not exceeding sixty-six feet in width; to commence at some point in the city of Camden, in the

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county of Gloucester, and to run to some point at the town of Woodbury, in said county, distant about eight miles, with as many sets of tracks or rails as they may deem necessary; and that it is in and by the said eighth section made lawful for the said president and directors, their agents, superintendents and others in their employ, to enter at all times upon all lands or water, for the purpose of exploring, surveying, levelling or laying out the route or routes of such road, and of locating the same, doing no unnecessary damage to private property; and that when the route of such road should be agreed upon and filed in the office of the secretary of state, it is thereby further made lawful for the said company, by its officers, agents, engineers, superintendents, contractors, workmen and other persons in their employ, to enter upon, take possession of, hold, have, use, occupy and excavate any such lands, and to erect embankments, bridges and all other works which may be necessary or suitable to call into full effect the objects of said charter; that there is a proviso or condition contained in the said section, by which it is provided that the said corporation shall pay or make tender of payment of all damages for the occupancy of the lands through which the said railroad may be laid out, before the said company, or any person in their employ, shall enter upon or break ground in the premises, except for the purpose of surveying said route, unless the consent of the owners of such land be first had and obtained.

That in and by the ninth section of the said act, it is further provided, that if the owners of the land on which said railroad shall be made, shall not be willing to give the same for such purpose, and the said company and owners cannot agree as to the price, it shall be the duty of any judge of the inferior court of common pleas of the said county of Gloucester, who is disinterested in the premises, upon the application of either party, and after hearing the parties, to appoint three disinterested freeholders of said county as commissioners to assess the price or value of said land, and to assess the damage which any individual or individuals may sustain by said road; and the said commissioners are thereby directed and required, after giving notice to both

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parties of the time and place of meeting, to meet and view the premises and hear the parties, and therein to make such decision and award as to them shall seem just and proper, and transmit such award and decision, together with a description of the said land and the quantity taken, by whom owned and how situated bounded and described, in writing under their hands and seal or under the hands and seals of a majority of them, to the judge who appointed them, to be by him returned and filed, together with all the papers before him relating thereto, in the clerk's office of the county, there to be kept as a public record, and copies taken, if required by either party; and it is in and by the said ninth section further enacted, that if either party shall be aggrieved by the decision of such commissioners, the parties so aggrieved may appeal to the inferior court of common pleas of the county, at the first or second term after the decision of the commissioners, by proceeding in the form of petition to the said court, with notice to the opposite party of such appeal, which proceeding shall vest in the said court of common pleas full right and power to hear and adjudge the same, and that if required, the said court shall award a venire in the common form for a jury before them, to hear and finally determine the same and that it shall be the duty of said jury to assess the value of said land and all damages sustained.

That the complainant permitted the said company and persons in their employ peaceably to enter upon his land for the purpose of surveying, laying out and locating said road, and that they entered thereon and located their road over and across his land without molestation or hindrance; that the said road is located across the most valuable part of the complainant's farm and through his peach orchard; that the surface of the land is much higher than the intended grade of the road at that point and that a ditch of between seven and eight feet deep will be necessary, so that the complainant's land, to a considerable extent will have to be excavated and removed, and the peach orchard destroyed, in order to construct the road; that the route and location of the road across the complainant's farm is such as to cut off from his farm a valuable piece of land of a triangular

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re, which will be thereby rendered valueless to the complainant, and other lands of the complainant will be much injured and greatly lessened in value by the construction of said road. That the complainant had frequently proposed to sell his land to the company for a reasonable price, and less than his estimate of the value of the land and the damages occasioned by the construction of the road, but that the company have refused to accept his offer, and that they cannot agree as to the price of the

The bill further states, that the complainant being unable to agree with the said company for the price of his land, on the twenty-fourth day of August, eighteen hundred and thirty-six, the judge of the court of common pleas of the county of Gloucester, on the application of the company, had appointed commissioners to assess the value of the land wanted by the company, and damages under the act; that the commissioners had viewed the land in the presence of the officers and agents of the company, but in the complainant's absence; that the commissioners having viewed the premises, adjourned to meet at a subsequent day, of which the complainant had notice; that the complainant then attended and proved by two witnesses that the value of his land and damages was at least one thousand dollars, and by a third witness that the said value and damages were fifteen hundred dollars, and that to the complainant's knowledge, no witness was produced on the part of the company before the commissioners; that the commissioners assessed the value of complainant's land at one hundred and sixty dollars, and his damages at three hundred and sixteen dollars, making in the whole for his land and damages, four hundred and seventy-two dollars, which is not one third the value of his land and damages; that the complainant, according to the provisions of the act of incorporation, appealed to the inferior court of common pleas of the county of Gloucester, from the decision of the commissioners, and gave to the company due notice of appeal; that the appeal is still pending undetermined in the court, and that no assessment of the value of the complainant's land and of his damages has yet been made by a jury,

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according to the provisions of the act of incorporation ; that the complainant verily believes that much larger damages will be assessed by a jury than were awarded by the commissioners, and that before the said appeal can be tried the company will prove insolvent, so that if they are permitted to proceed in excavating and carrying away the complainant's land, he will sustain great and irreparable injury, without the possibility of redress.

The bill further states, that the boundaries and description of the complainant's land are not set out in the decision and award of the said commissioners as they ought to be, and that the quantity of land therein stated to be taken by the said company is incorrect, and much less than is actually taken.

The bill further charges, that a contractor of the company, with a number of laborers, on the first day of February instant, tore down the complainant's fences and commenced excavating and carrying away his land, and that they still continue so to do, without the said company, before entering on the complainant's land, paying or making tender to the complainant of all the damages for the occupancy of his said land, and without the consent of the complainant first had and obtained ; that the entry so made by the company upon the complainant's lands was not made for the purpose of surveying the route of the road, but for the purpose of making and grading the same ; admits that the company have tendered to the complainant the sum of four hundred and twenty-two dollars awarded by the commissioners, but denies that they have tendered to him all his damages sustained by the occupancy of the said land for the purpose of the said road.

The prayer of the bill is, that the company may pay to the complainant the damages he will sustain by the construction of the said road through his land, and that in the meantime, the said company, and their engineers, contractors, &c., may be restrained and enjoined from committing further waste upon the complainant's land, and from entering upon and carrying away the same, and that the complainant may have such further and other relief as may be agreeable to equity, &c.

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Upon filing the bill an injunction was issued as prayed for.

The defendants, by their answer, filed on the twenty-ninth of April, eighteen hundred and thirty-seven, admit many of the material allegations contained in the bill of complaint; but they deny that he ever offered to sell his land to the company, at any price; that the value of the land and damages as awarded by the commissioners is inadequate, or that a larger sum will be assessed by a jury; that there is any defect in the description of the complainant's lands contained in the award of the commissioners, or that the amount therein stated is less than the quantity actually required; and that the said company is insolvent or likely to become so. They allege that before entering on the complainant's land for the purpose of making or grading the road, they tendered to him the value of his land and damages, as awarded by the said commissioners, which he refused to accept, and that they are still willing to pay the same. They insist that the bill contains no equity; that the matters in dispute have been tried by the commissioners; that they may be tried again before the court of common pleas upon the appeal, pursuant to the provisions of the act of incorporation, or are otherwise triable at law, and that the complainant is entitled to no relief in equity.

A separate answer was also filed by James Smith, the contractor by whom the excavations upon the complainant's land were being made, stating that the work was done by him, by order and under the direction of the railroad company; that he had no interest in the work except as a contractor, and that in making the excavations and grading the road, no unnecessary damage was done to the complainant's land.

Upon filing the answer, notice was given by the defendants of a motion to dissolve the injunction.

The cause came on for hearing upon the motion to dissolve the injunction.

R. L. Armstrong and Wall, in support of the motion.

Browning, Jeffers and Southard, contra.

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THE CHANCELLOR. The defendants in this case were incorporated by an act of the legislature of New-Jersey, on the first of March, eighteen hundred and thirty-six, for the purpose of constructing a railroad from Camden to Woodbury. They were duly organized, and surveyed and laid out their road, which passed through the land of the complainant. The parties could not agree as to the price of the land, and the defendants, in pursuance of the ninth section of the act, called commissioners, who made an assessment of the value of the land and damages of the complainant; the amount whereof the defendants tendered to the complainant, which he refused to accept, and appealed from the decision of the commissioners, as by the same section he was authorized to do.

After making the tender of the amount reported by the commissioners, and pending the appeal, the defendants entered upon the land of the complainant and commenced making their road; claiming the right so to do by virtue of their act of incorporation, and the proceedings had under it. The complainant filed his bill for an injunction, to restrain the defendants from proceeding to make their road until the question of damages was settled upon the appeal. The injunction was granted. An answer was put in by the defendants to the bill, and upon that answer the defendants now move to dissolve the injunction.

Under these circumstances, the first question presented is, whether the defendants, by virtue of their charter, and their proceedings under it, are entitled to enter upon and take possession of the land of the complainant and make their road.

The decision of this question depends upon the true construction of the eighth and ninth sections of the act incorporating the defendants. By the eighth section, the company are invested with all the powers necessary to make the road, and for that purpose to enter upon the lands and form the road, &c. But their power is limited by this proviso: "That the said company shall pay, or make tender of payment, of all damages for the occupancy of the lands through which the said road may be laid out, before the said company, or any person in their employ, shall enter upon or break ground in the premises, except for the

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purpose of surveying said route, unless the consent of the owner of such land be first had and obtained."

The ninth section provides, that if the parties cannot agree as to the price of the land, either party may have commissioners appointed, "to assess the price or value of said land, and the damage which any individual may sustain by the road, and from the decision of those commissioners either party may appeal to a jury, whose duty it shall be to assess the value of said land and all damages sustained," and their verdict shall be final; "and upon payment or tender of the sum so found by the commissioners, or by the jury, with costs, if any, the said corporation shall be deemed to be seized and possessed in fee simple of all such lands and real estate so appraised as aforesaid."

The rule of construction, in these cases, is correctly stated by the court in the case of *Buonaparte v. The Camden and Amboy Railroad Co.*, 1 *Bald.* 229. Justice Baldwin, in speaking of the authority of the company to take land, remarks, that "their authority is special, limited and conditional, and must be strictly followed. The law is made for their benefit, and it is their duty to take the previous steps incumbent on them, or they become trespassers. The principle is this: the company should not be interfered with if they are within their authority; but for the very reason that such large powers were given, the court will keep them within the limits of those powers. They must pursue the precise remedy given them by the law, and are entitled to no other."

In this case, the precise remedy prescribed by the act in case the parties cannot agree as to the price of the land, is, to call commissioners; and if either party are dissatisfied with their award, to appeal to the next court of common pleas and have the matter submitted to a jury.

The right to appeal from the decision of the commissioners is unconditional, and requires no cause to be shown. It is as much a part of the remedy as the right to call the commissioners. And the decision of the jury is declared to be final. The very act of appealing sets aside the report of the commissioners, and the

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question of the value of the land and damages is yet entirely open. It is the duty of the company, who claim the right to enter, to show affirmatively that they have the right; and I cannot think that they have pursued the precise remedy given them by the law to ascertain the value of the land and damages, when that question is wholly undetermined, and when their right to the property depends upon paying or tendering the amount of the value of the land and damages.

But it was contended on behalf of the company, that by the eighth section of the act, they were authorized to take possession of the land and make their road, &c.; and that the only proviso or condition annexed was, that they should, before entry, pay or make tender of payment, of all damages for the occupancy of the land through which their road should run. And that the ninth section provides the means by which they shall obtain the title to the lands; which may be done after they have the possession or occupancy of the land, and made the road, by virtue of the provisions of the eighth section.

I do not consider this the true construction of the act. By the term occupancy, in the eighth section, I think the legislature meant all the right or interest which the company would have in the land for the purposes contemplated by the act. For, although in the latter part of the ninth section it is said, that the company shall be "deemed to be seized and possessed in fee simple," yet by the twenty-second section it is declared, that if at any time the road shall be abandoned, the land shall revert to the original owner or owners; thereby limiting the interest of the company to the mere use or occupancy of the land for the purposes contemplated by the act; which gives color to the use of the term occupancy as expressing all the right of the company in the land. If it mean any right less than their entire interest in the land, it must be an occupancy limited either in point of duration, or in the use which may be made of it. No such limitation is expressed in the section, nor can it be intended. Therefore the legislature, in the eighth section, when treating of the damages for the occupancy of the land, must have intended such

[*Browning v. Camden and Woodbury Railroad Co.*]

occupancy as was necessary for the company, to make and use the road according to the terms of their charter; and as to the value of the land holden, it is immaterial whether the company have the title such as they may acquire by virtue of their charter, or the mere right of occupancy. I therefore conclude that the legislature used the term occupancy, to express all the right and interest which the company could acquire in the land.

But if it be otherwise, it does not help the case of the defendants; for by the eighth section it is expressly provided, that they shall not enter nor break ground until they have paid or tendered all damages for the occupancy of the land; and there is no provision for ascertaining those damages, unless that provision is found in the ninth section. And I think it cannot be contended that in such case the company may make themselves the judges of the amount of damages, and obtain a right of entry by tendering such amount as they may consider sufficient; for if so, their right of entry would be as perfect by tendering an insufficient amount, as an amount that might eventually turn out to be sufficient.

In the case of *Buenaparte v. The Camden and Amboy Co.*, 1 *Bald.* 227, the court, in treating of this subject, say, "We should have no hesitation in enjoining the execution of the law, if it provided no compensation, without declaring it void. This would do justice to the individual without defeating the objects of the law." "We would continue the injunction till the company had made the compensation, without imposing on the owner any burthen of seeking or pursuing any remedy, or leaving him exposed to any risk or expense in obtaining it. The duty of the legislature is to provide for compensation, and of the company to make it, simultaneously with the disseizin of the owner and the appropriation of his property to the purposes of the law."

Under any view of the case, I am of opinion that the defendants had no right to enter, except to make their survey; and the only question remaining is, whether this court should interfere by its injunction.

It is a case where the company claim the right to enter, and

[*Browning v. Camden and Woodbury Railroad Co.*]

have entered, under color of law, without having complied with the requirements of that law.

In the case of *Buonaparte v. The Camden and Amboy Co.*, already cited, the court, in treating of the remedy, say, "If his rights of property are about to be destroyed without the authority of law, or if lawless danger impends over them by persons acting under color of law, when the law gives them no power, or when it is abused, misapplied, exceeded, or not strictly pursued, and the act impending would subject the party committing it to damages in a court of law for a trespass, a court of equity will enjoin its commission."

In this case, according to my view, the company have exceeded their power, and not strictly pursued their remedy, and therefore brought themselves within the operation of the above principle; and I am, therefore, of opinion, that the injunction should be continued until the company shall have agreed with the complainant, or established their rights according to the provisions of the ninth section of their act of incorporation.

Order accordingly.

CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF THE STATE OF NEW-JERSEY
JULY TERM, 1837.

JOHN CASLER V. JOHN I. THOMPSON.

*Equity will decree the specific performance of a parol agreement for the sale of land, if the purchase money has been paid, possession of the land taken by the purchaser, and improvements made thereon.**

BILL for the specific performance of a parol agreement for the sale of land, and for an injunction to restrain the vendor from proceeding at law to recover possession from the vendee. Upon filing the bill an injunction issued, as prayed for. Hearing upon bill, answer, replication and proofs.

Vredenburg, for complainant.

Hartshorne, for defendant.

THE CHANCELLOR. The bill charges, that defendant, in eighteen hundred and twenty-five, sold certain premises to complainant for fifty dollars, by verbal agreement; that he put com-

* Part performance of a parol agreement for the sale of land, will take the case out of the statute of frauds, and a specific performance will be decreed in equity. What acts amount to a part performance? See 1 *Forsb. Eq.* 183, note c.; 2 *Story's Eq.* sec. 760.

[Casler v. Thompson.]

plainant in possession, which he still retains; he paid the consideration and made some improvements on the premises, by building fences and other small improvements.

The defendant refused to give a deed, but brought ejectment for the possession. The complainant prays an injunction, and that defendant be compelled to give deed, &c.

The defendant, in his answer, admits an agreement, and that he, the complainant, went into possession under the agreement; that he still has possession, and it is proved that he paid the consideration, which the defendant offers to restore; but he insists, by way of avoidance, that the agreement was conditional, and that by it he was not bound to give a deed, as the condition had not been complied with; and he denies that he sold the said lot in any other wise except upon said condition.

As this allegation of a condition, set up by the defendant, is not in answer to any charge in the bill, it becomes the defendant to prove it, if he would avail himself of the benefit of it; but as there is no evidence upon the subject of the condition, I lay it aside.

But the defendant, although he admits the sale, yet at the same time denies having sold the lot in any other way than upon said condition.

It is not necessary, in this case, to inquire how far it might be proper to take the admission of the defendant, that he sold the lot, separate from the allegation that the sale was conditional, for the allegation of the complainant in this respect, is sustained by the evidence in the case, without reference to that part of the answer. Robinson swears that he surveyed the lot for the defendant, in August, eighteen hundred and twenty-six, and he understood from both parties, "that it was for the purpose of making a deed for it, to Casler, who had bought; that they both wanted a deed made." The agreement is also proved by Hart and Reid. And it is admitted that he went into possession by the consent of the defendant; that he paid the consideration and improved the property, and retained the undisputed possession for some years.

[Cauler v. Thompson.]

And the question now occurs, whether in such case a specific performance should be decreed. I know of no rule to the contrary. Here the part performance is certainly of the identical agreement mentioned in the bill, and that contract is proved.

It has been held, that payment of part of the consideration money, or taking possession and making substantial improvements, will take the case out of the statute of frauds: *Wetmore v. White, et. al.*, 2 C. C. E. 87. But here all the purchase money is paid, possession taken and held for years, and improvements made.

Let there be a decree for specific performance and judgment to remain, &c.

LEVI PEACOCK, and **LETTIS** his Wife, suing by **B. R. PEACOCK**, her next friend, v. **JOHN BLACK** and **THOMAS BLACK**, Executors of **DANIEL NEWBOLD**, deceased, who was Executor of **JOHN HOLLINSHEAD**, deceased.

Where a bill for the recovery of a legacy bequeathed to a married woman, was filed thirty-one years after the death of the testator, twenty-four years after the settlement of his estate, and seventeen years after the death of the executor, and no cause shown for the delay, the bill was dismissed on the ground of the presumption of the payment of the demand, arising from the time which elapsed after the right of action accrued before suit brought.

The cases of *Ellison v. Moffat*, 1 John. Chan. R. 46, and *Jones v. Turberville*, 2 Vesey, jun. 11; approved.

Bill by a married woman, (sueing by her next friend,) and her husband, for the recovery of a legacy bequeathed to the wife.

The bill states, that John Hollinshead, late of the township of Northampton, being possessed of a very considerable personal estate of various descriptions, and also seized and possessed of a very considerable real estate, and being of sound mind and memory, on or about the twenty-fifth day of April, in the year of

[Peacock v. Newbold's Ex'rs.]

our Lord one thousand eight hundred and one, made his last will and testament, in writing, of that date, signed, sealed and published in the presence of three subscribing witnesses, and executed in due form of law to pass real and personal estate, in the words and figures and substance following, to wit: "I, John Hollinshead, of the township of Northampton, in the county of Burlington, and state of New Jersey, farmer, being somewhat indisposed as to my bodily health, but of perfect, sound and disposing mind and memory, do think proper to make my last will and testament in manner and form following. Imprimis. I give and bequeath unto my loving wife the sum of five hundred pounds, to be paid by my executors as soon as they conveniently can raise the money from the sales of my property; also it is my will that my wife shall have and enjoy one room in the house where I now *dwell*, and have a horse kept on hay and grass; also use of the kitchen during her widowhood; which said sum of money and other things I give and bequeath unto her as full satisfaction and in lieu of her dower of and in my real estate. Item. I give and bequeath to my natural daughter that I had by Virgin Bishop, one hundred and fifty pounds, to be paid in one year after my death by my executors or executor. Item. I give and devise unto my daughter Sarah Hollinshead the plantation whereon I now live, to her and *heir's* and assigns for ever on the following condition; that is, as soon as my executors or executor shall settle my estate they shall appoint three judicious men to appraise the above said farm, and if the said farm should be appraised to a greater amount than my daughter Lettis's and Elizabeth's shares, then and in that case it is my will that my above mentioned daughter Sarah shall pay each of her above mentioned sisters, Lettis and Elizabeth, such sums as shall make them equal to her share. Item. I give and devise unto my son-in-law Levi Peacock, all that lot of land on the south side of a new ditch cut for the purpose of draining his swamp on the north side of his farm. Item. All the rest, residue and remainder of my estate, real and personal, whatsoever, after my just debts, funeral charges and the legacies above mentioned are paid, I give, devise, and bequeath

[Peacock v. Newbold's Ex'rs.]

to my daughter Lettis and my daughter Elizabeth's children—
ally to be divided, Lettis's share to be one half—the children's
re to be placed out on interest, to be paid unto the above men-
ed Elizabeth during her natural life for the maintenance and
ication of them; but in case it should so happen that my
ghter Sarah should die without leaving lawful issue, in that
e her share and part of my estate to go to her surviving sisters
their heirs equally, share and share alike. Lastly I do hereby
ninate, constitute and appoint my friends, Daniel Newbold and
lliam Irick, esqr's, of Northampton aforesaid, executors of this
will, and constitute them guardians of my daughter Sarah
il she shall attain to lawful age. I hereby revoke all former
ls by me at any time made. In testimony of all which I have
eunto set my hand and seal, this twenty fifth day of April, the
r eighteen hundred and one."

The bill further states, that about the beginning of the month
May in the same year, the said John Hollinshead, being so
zed of the said real and personal estate, died, without altering
evoking the said will, and thereupon afterwarde, to wit, on the
rentth day of May, in the same year, the said Daniel New-
d and William Irick, the executors named in the said will,
y proved the same and took upon themselves the execution
roof, and the same was regularly recorded and entered in the
rogate's office of the said county, and affiled of record in the
rogative office at Trenton, agreeably to law; and by virtue
xroof the said Daniel Newbold, one of the said executors, (the
id William Irick, the other executor, acting only for conformity
d without intermeddling with the money arising from the sales
the real and personal estate of the testator or other assets of the
id estate,) possessed himself of all the personal estate and effects
the testator, and sold and conveyed divers portions of the real
ate of the testator, under pretence that authority was given by
e said will to sell the same and receive the money therefor to a
ry considerable amount, and much more than sufficient to
atisfy all his just debts, funeral and testamentary expenses and
pecific legacies; and the said Daniel Newbold afterwards, to wit,

[Daneick v. Newbold's Exrs.]

in the term of August, in the year of our Lord one thousand eight hundred and seven, did exhibit in the orphans' court of the county of Burlington his account, styling himself acting executor of the last will and testament of the said John Hollinshead, as well of and for so much of the goods, chattels and personal estate and the net proceeds of the real estate of the said deceased, sold under the said will, as had come to his hands to be administered as for his payments and disbursements out of the same. And the same having been audited and stated by the surrogate of the county and been referred to auditors, and by them re-stated, the said orphans' court did afterwards, to wit, in the term of August, in the year of our Lord one thousand eight hundred and eight, decree that the same should be allowed in all things as reported and re stated by the said auditors; whereby it appears that the residue of the said real and personal estate of the said testator, and the balance in the hands of the said Daniel Newbold, acting executor as aforesaid, to be paid and distributed agreeably to the directions of the said last will and testament, was six thousand and six dollars and eighty-two cents.

The bill further states, that the said Daniel Newbold, acting executor as aforesaid, in his life time, possessed himself of all the residue and balance aforesaid of the net proceeds of the said real and personal estate of the said John Hollinshead, deceased, and particularly of the said sum of six thousand and six dollars and eighty-two cents; his co-executor, William Irick, never having meddled with the same or received any part thereof, and being so possessed thereof afterwards died, to wit, in or about the month of February, in the year of our Lord one thousand eight hundred and fifteen—having in his life-time made and executed his last will and testament in writing, and thereby appointed John Black and Thomas Black the executors thereof, and thereafter the said John Black and Thomas Black duly proved the same and had letters testamentary thereupon granted to them in due form of law, bearing date in the month of February, in the year of our Lord one thousand eight hundred and fifteen, and took upon themselves the burthen of the execution thereof.

[Peacock v. Newbold's Ex'rs.]

The bill further charges, that the said Levi Peacock never did either legally or equitably act on the said legacy so bequeathed to the said Lettis, or reduce the same into his possession, or attempt or intend so to do, nor did the said Daniel Newbold in his life-time pay any sum whatever on account thereof; and if the said Daniel Newbold in his life-time had done so, or did retain the same in his own hands, or claim so to do in order to satisfy any debt or pretended debt due or claimed to be due from the said Levi, he acted entirely in his own wrong and was guilty of a violation of the duty imposed upon and the trust reposed in him by his testator, and in plain and manifest contradiction to the said trust, and to the will and intention of the testator, who well knowing that the said Lettis was a married woman, both expressly bequeathed the same to her, so that the same might not be liable or subject to the debts, control or mismanagement of her husband.

The prayer of the bill is, that the defendants, executors as aforesaid, may be decreed to come to a fair and just account with the complainants, for or in respect to all and singular the real and personal estate of the said testator, John Hollinshead, which came to the hands of the said Daniel Newbold, in his life-time separately or which was received by him or by any other person by his order or for his use separately, or which without his wilful default might have been received by him, and that the same may be applied in a course of administration agreeably to the directions of the said will, and thereout the said Lettis may be fully paid the said one half of the said residue of the net proceeds of the said real and personal estate, agreeably to the said settlement allowed and decreed in the said orphans' court, in the county of Burlington, together with all interest due thereon, or so much thereof as the said Lettis may appear justly entitled unto under the directions of the said will of the said testator, and that the same may be settled on her and her children under the directions of this court for her sole and separate use, the said Levi consenting thereto and praying that the same may be made free from his control, and waiving and relinquishing his marital

[Peacock v. Newbold's Exrs.]

rights in respect thereto, or to any part of the said legacy as far as he hath right so to do, and that the complainants may have such further and other relief in the premises as shall be agreeable to equity and good conscience.

The defendants, by their answer, admit the bequest, and the balance in the hands of the executor upon the final settlement of his accounts, as charged in the bill. But they say that although by the will of the said John Hollinshead, deceased, he bequeaths to the said Lettis Peacock, wife of Levi Peacock, and not to the said Levi Peacock himself, one equal undivided half part of the residue of his estate, yet the bequest so made to the said Lettis Peacock being of personal estate, it was in law a chose in action which the said Levi Peacock, as her husband, he having survived the said John Hollinshead the testator, had full and legal right to make his own exclusive property by reducing the same into his possession; that they have been informed and verily believe, and trust they will be able to prove, that the said Levi Peacock, did after the death of the said John Hollinshead, call upon the said Daniel Newbold in his life time as acting executor of the last will and testament of the said John Hollinshead, deceased, and did claim of the said Daniel Newbold the one equal half part of the residue of the estate of the said John Hollinshead, deceased, so as aforesaid bequeathed to his wife Lettis, declaring that it was his intention to reduce the same into his possession and thus make it a part of his own proper estate; and the said Levi Peacock, being largely indebted unto the said Daniel Newbold, in his own right, and also as executor of the last will and testament of the said John Hollinshead, deceased, on various accounts, and the said Levi Peacock also having claims against the said Daniel Newbold in his own person and right as well as executor as aforesaid, the said Daniel Newbold and Levi Peacock, at the request of the said Levi Peacock, accounted together, in which accounting together the said Levi Peacock was charged with such sums of money as he admitted he owed to the said Daniel Newbold in his own right, and also as executor as aforesaid, and received credit for such claims as he had against the

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said Daniel Newbold as executor as aforesaid, and also for the amount of his private account against the said Daniel Newbold; and the said Levi Peacock having declared his intention to reduce the legacy so bequeathed to the said Lettis, his wife, into his own possession, and make it a part of his own proper estate, credit was also granted him upon that accounting, at his own request, for the one equal half part of the residue of the estate of the said John Hollinshead, deceased, amounting, according to the said settlement before the said orphans' court of the county of Burlington, to the sum of three thousand and three dollars and forty-one cents; and there appearing upon that accounting and settlement between the said Daniel Newbold and the said Levi Peacock, to be a considerable balance still remaining due from the said Levi Peacock to the said Daniel Newbold, the said Levi Peacock agreed to pay to the said Daniel Newbold the said balance, and to accept the credit so given to him in the said settlement and accounting, in full discharge of the one half part of the residue of the estate of the said John Hollinshead, deceased, so bequeathed to the said Lettis his wife.

And the defendants further say, that the final account of the said Daniel Newbold, as acting executor of the last will and testament of the said John Hollinshead, deceased, was settled and a decree of confirmation made thereon before the orphans' court of the said county of Burlington, in the term of August, in the year of our Lord one thousand eight hundred and eight; that the said Daniel Newbold survived after the said settlement until the month of February, in the year of our Lord one thousand eight hundred and fifteen, and during the interval between the said settlement and the death of the said Daniel Newbold, a period of more than six years, the said Daniel Newbold recovered a judgment for a large amount against the said Levi Peacock, in the inferior court of common pleas in and for the said county of Burlington, and caused an execution of fieri facias de bonis and terris to be issued thereupon, and to be delivered to the sheriff of the said county of Burlington to be executed in due form of law, under and by virtue of which execution the estate, real and per-

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sonal, of the said Levi Peacock, was sold, and the proceeds of the said sale fell short of the amount due to the said Daniel Newbold on the said judgment and execution; ever since which sale the said Levi Peacock and Lettis his wife, have been and still are in indigent circumstances; that after the death of the said Daniel Newbold, and after these defendants had taken upon themselves the execution of his will and the settlement of his estate, to wit, in the term of August, in the year of our Lord one thousand eight hundred and fifteen, these defendants made application to the orphans' court, in and for the said county of Burlington, to limit and appoint a time within which the creditors of the said Daniel Newbold, deceased, should bring in their debts, demands, and claims against his estate, conformably to the provisions of the statute in such case made and provided; upon which application the said court in the term last aforesaid, did by a rule of the said court order and direct the defendants as executors as aforesaid, to give public notice to the creditors of the estate of the said deceased to bring in their debts, demands, and claims against the same within one year from that time, by setting up such notice in five of the most public places in the county of Burlington for the space of two months, and also by advertising the same for the like space in one of the newspapers printed in this state; and that if any creditor should neglect to exhibit his or her debt, demand or claim, within the time so limited, after public notice given as aforesaid, such creditor should be for ever barred of his or her action therefor against these defendants, as executors as aforesaid; which notice the defendants immediately thereafter caused to be set up and published according to the requirements of the said rule; and that after the sale of the estate of the said Levi Peacock under the execution aforesaid, the said Levi Peacock and Lettis his wife, or either of them never pretended to the said Daniel Newbold, in his lifetime, as these defendants verily believe, that they or either of them had any claim upon the said Daniel Newbold for the residuary share of the estate of the said John Hollinshead, deceased, bequeathed as aforesaid to the said Lettis, or that the same was not fully paid, although suffering

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ring the whole of that period under the pressure of great
verty; and from the time of the decease of the said Daniel
ewbold, until the exhibition of their bill in this case, the said
vi Peacock and Lettis his wife slept over their said claim, not-
withstanding the said rule of the said orphans' court and the public
lice given by these defendants as aforesaid, and never did
im of these defendants, or either of them, the said residuary
are of the estate of the said John Hollinshead, deceased, so be-
eathed to the said Lettis, or pretend that the said Daniel New-
ld was indebted to them, or either of them, on that or on any
er account; and the defendants insist that the great delay of
s said Levi Peacock and Lettis his wife, in making this de-
and, is a circumstance strongly corroborative of the truth of
se defendants' defence against the said claim; and that the
d Levi Peacock and Lettis his wife, have been induced to pre-
at this day, after having suffered it to sleep for more than
enty years, so stale a claim, from the hope that the death of
s said Daniel Newbold and the great lapse of time would put
out of the power of the defendants to prove that the said resi-
ary share had been paid to the said Levi Peacock; and that
ir testator having thus in his lifetime paid the said legacy to
e said Levi Peacock, husband of the said Lettis, they cannot
w be lawfully called in question respecting the same in this
morable court; and the defendants deny that the said Levi
sacock had any other just and lawful claims against the said
aniel Newbold, either in his own right or as executor of the
id John Hollinshead, deceased, except those for which he was
lloved credit in the said settlement and accounting between the
id Daniel Newbold and the said Levi Peacock.

The complainants filed a replication, and the cause was heard
upon the pleadings and proofs.

Wall and I. H. Williamson, for the complainants,

A. Brown and H. W. Green, for the defendants,

[Peacock v. Newbold's Ex'rs.]

THE CHANCELLOR. This bill was originally filed by Levi Peacock and his wife Lettis, who sued by her next friend, to recover of John and Thomas Black, as executors of Daniel Newbold, deceased, the amount of a legacy given by John Hollinshead, deceased, to the said Lettis Peacock, who was his daughter, and Daniel Newbold was acting executor of said Hollinshead, deceased. The defendants, in their answer, insist that Daniel Newbold, in his life time, paid this legacy to Levi Peacock or his wife; and the decision of the case depends upon the evidence as to the truth of this defence.

It appears that John Hollinshead died in eighteen hundred and one. His will is dated April twenty-fifth, and was proved May eleventh, of that year. After making several devises, he gives the residue of his estate to his daughter Lettis, and his daughter Elizabeth's children; one half to Lettis, and the other half to be placed out at interest for her use during her life, and then to her children, &c.

This estate was settled in the orphans' court in eighteen hundred and eight by auditors, and the balance in the hands of the executor ascertained to be six thousand and six dollars and eighty-two cents; for the half of which, with interest from that time, the complainants claim the decree of this court.

Daniel Newbold, the executor, died in eighteen hundred and fifteen. The bill in this case was filed in eighteen hundred and thirty-two, which is thirty-one years after the death of the testator under whom the complainants claim—twenty-four years after the estate was settled, and the amount of the legacy thereby ascertained—and seventeen years after the death of Daniel Newbold, the executor.

There is no positive evidence of payment, but the defendants rely upon the presumption of payment arising from the time which has elapsed since the right of action accrued, which presumption they allege is strengthened by the further evidence which will be hereafter adverted to.

If the case rested upon the above stated facts, unexplained by any evidence on the part of the complainant to account for the

[Peacock v. Newbold's Ex'rs.]

delay, I should be disposed to give effect to the defence of the defendants.

In the case of *Ellison v. Representatives of Moffat*, 1 John. Chan. R. 46, where the bill was filed for an account upon transactions before the revolutionary war, which were interrupted by that war, the chancellor observes, "The parties lived in the same county, and without accounting for the delay, the complainant suffered a period of twenty-six years to elapse from the termination of the war to the time of filing his bill. It would not be sound discretion to overhaul accounts in favor of a party who has slept on his rights for such a length of time, especially against the representatives of the other party, who have no knowledge of the original transaction."

And in the case of *Jones v. Turberville*, 2 Vesey, jr. 11, lord commissioner Eyre remarks, that at law claims are presumed satisfied after a certain lapse of time, and "courts of equity would do very ill by not adopting this rule. So essential is it to general justice, that though the presumption has often happened to be against the truth of the fact, yet it is better for the ends of general justice that the presumption should be made and favored, and not be easily rebutted, than to let in slight evidence of demands of this nature, from which infinite mischief and injustice might arise."

I approve the doctrine of these cases. But it is not necessary, in this case, to rely entirely upon the length of time, to raise the presumption of payment. That presumption is very much strengthened by the evidence in the case. It appears that about ten years after the death of Hollinshead, Newbold obtained a judgment against Levi Peacock for a large amount, and sold his farm and goods; and after the death of Newbold, his executors, the above named defendants, also obtained a judgment against Levi Peacock before a justice; and it is most manifest from the evidence, that Levi Peacock became intemperate soon after the estate of Hollinshead was settled, and that he was poor at the time of the death of Daniel Newbold, who was in good circumstances.

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These circumstances are in aid of the presumption of payment: and I can find no evidence which tends to explain the delay on the part of the complainants. I can hardly consider it possible that a man situated as Mr. Peacock was, should allow so long time to elapse without recovering this legacy, and not be able to show some satisfactory cause for the delay. But so far from accounting for the delay, the direct evidence in the cause strongly confirms the presumption of payment.

Joseph Hilliard testifies, that he had heard Lettis Peacock say "that she expected her legacy would have been more; she expected her father's estate was so large that she would have had more than she had had. She did not say it had been paid, but witness supposed from what she said that it had been settled, and that the amount was smaller than she had expected."

Alanson White testifies, that since the sale of Peacock's place by the sheriff, he, Peacock, rode up to Mount Holly with him, and said he was going to settle with Daniel Newbold, or with his estate; and when he returned informed witness that he had closed the settlement that day.

George Early testifies, that since the sale he has heard Peacock and Newbold talking upon the subject. Peacock said, "that affair of Lettis, my wife, is settled at last, after so long time, and done with." And both Peacock and Newbold said that "they were glad that matter about the wife's legacy was settled and done with."

There is other testimony of a similar import, but from this I am entirely satisfied, that in the negotiations between Newbold and Peacock, this legacy has been settled; and I have no fear that the presumption of law, in this case, will be in opposition to the fact.

Let the bill be dismissed, with costs.*

Decree accordingly.

* The decree in this cause was unanimously affirmed, except as to costs, by the court of errors and appeals, at November term, eighteen hundred and forty-five. The parties were directed to pay each their own costs, in the court below and on the appeal.

THE EXECUTOR OF MARY WALTON v. JAMES HERBERT.

If the defendant is properly charged in the bill, as executor, or devisee, or in any other special capacity, it is no ground of demurrer that the subpoena is issued against him generally, without stating the character in which he is sued.

THE bill is filed against James Herbert, surviving executor of James Herbert, deceased. The prayer is for process against said James Herbert. The subpoena issued against James Herbert generally, without stating the character in which he is sued. General demurrer.

Dayton, for defendant, in support of the demurrer.

Hartshorne, for complainant, contra.

THE CHANCELLOR. The cases cited by the defendant, in support of the demurrer, do not apply to this case.

In the case of *Travis v. Waters*, 1 *John. Chan. R.* 48, the bill of revivor was filed by heirs and devisees, when it should have been filed by the executors, &c.

And in the case of the executor of *Brasher v. Van Courtlandt*, 2 *John. Chan. R.* 247, it was objected that the subpoena was issued against the defendant in his individual capacity, when he should have been described as a committee. The Court do not sustain the objection, it being made at the time of the final decree; but they do not decide what they would have done in case the objection had been made upon the return of the subpoena.

It is by inspecting the bill that the defendant ascertains the nature of the charge against him, the subpoena only gives him notice that there is a bill filed against him, and if he be properly charged in the bill as executor, or devisee, or in any other capacity, it is not a good objection, that the subpoena is issued against him generally.

[Ex'r of Walton v. Herbert.]

In the case of *Elmendorf v. Delancy*, 1 *Hopkins*, 556, the court very properly remarks, "that it is essential that the defendants should be clearly designated as such; but it cannot be material whether they are designated by praying process against them in the form of courts of equity, or by a positive allegation that they are impleaded as defendants according to the forms of courts of law."

Demurrer overruled, with costs.

Order accordingly.

CHARLOTTE STILLWELL v. MARTHA PEASE et al.

A testator devises unto his son, J. P., his mansion-house farm in fee, "with this reserve, that the said J. P. or his heirs afford a lawful maintenance to my daughter A. S. and her two daughters from said farm, as long as they live and should want the same." He further devises as follows: "I will that my daughter A. S. should abide, and have a lawful maintenance, and her two youngest daughters with her, on said home farm, as long as she the said A. S. lives, and her two daughters shall want their maintenance." *Held*, that after the death of A. S. her daughters were not bound to remain upon the home farm to entitle themselves to the provision made for them in the will.

Dayton, for complainant.

Hartshorne, for defendant.

THE CHANCELLOR. This case depends upon the true construction of the will of Adam Pease, deceased, the grandfather of complainant; it is dated November tenth, eighteen hundred and thirty-one, and by it he devises as follows: "I will that my beloved wife, Martha Pease, should have at her own will and pleasure, full possession, control and use of the house I now live in, every part thereof, to her only, and to occupy as she pleases, with all the home farm, that I now live upon, to her only use, as long as she lives and remains my widow, and no

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longer. Then I will that my son, John Pease, should come in, (not his family,) with my beloved wife, Martha Pease, to live; and that he the said son, John Pease, should till and manage said farm to the best advantage, under the said Martha Pease; and the said John Pease is to let the said Martha Pease to have to her share of all the net proceeds of said farm, every year, in season and good order, one equal third part to her use, and the other two thirds to be the said John Pease's, for his compensation, and to be done in co-expense, by Martha Pease and John Pease; and that my colored man Jacob, and Hester his wife, should remain on said farm with said Martha and John Pease, in co-like in their maintenance, and clothing, and sickness and death, and that to be done for them as long as my beloved wife, Martha Pease, should live and remain my widow, &c. Then I will and bequeath unto my son, John Pease, after the death of my widow Martha Pease, all the *muntion* farm that I now live upon, the same part of land described as aforesaid, to him and his lawful heirs, for ever, with this reserve, that the said John Pease, or his heirs, afford a lawful maintenance of my daughter, Ann Stillwell, and her two daughters named Charlotty and Lucinda Stillwell, *ofrom* said farm, as long as they live, and *shoul* want the same."

And in a subsequent part of the will, he devises as follows: "Item. I will that my daughter, Ann Stillwell, should abide, and have a lawful maintenance, and her two youngest daughters with her, on said farm that I now live upon, as long as she the said Ann Stillwell lives, and her two daughters shall want their maintenance, named Charlotty and Lucinda Stillwell, and the same to be done by my beloved wife, Martha Pease, and my son, John Pease, after my death, of and from said home farm, for her portion of my estate."

There can be no doubt but that John Pease took this devise, subject to and charged with the support of Ann Stillwell, and her two daughters, Charlotte and Lucinda. But the defendant contends, in the first place, that they agreed to go out to the west, and that he provided a support for them there; and that

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the mother, Ann Stillwell, and one daughter, Lucinda, actually went out, but that Charlotte, the present complainant, refused to go; and that she ought to be bound by that agreement, as she was then nineteen years old, &c.

The fact that she was a minor, is a sufficient answer to this point, particularly as it is not perceived in what manner she was to be benefitted by the agreement, nor is it at all material whether she remained here by the interference of Jonathan Pease, or from her own unbiassed wish; the whole of the testimony upon that subject is impertinent.

In the next place, the defendant contends that he is not bound to support Charlotte except upon the home farm, and alleges that he has provided boarding and lodging for her there.

There is nothing in this objection; John Pease takes the farm with this reserve, "that the said John Pease, or his heirs, afford a lawful maintenance of my daughter, Ann Stillwell, and her two daughters, named Charlotty and Lucinda Stillwell, *of from* said farm, as long as they live and should want the same."

There is no condition annexed, in this part of the devise; and in the latter part of the will, where it is provided that Ann Stillwell should abide on the farm with her two daughters, it is only during the life of Ann Stillwell, and any argument which might possibly be founded upon that part of the will, is destroyed by the death of Ann Stillwell, the mother. I do not mean to intimate that even in the life time of Ann Stillwell, the complainant, Charlotte Stillwell, would be bound to abide on the home farm in order to entitle her to the support provided by the will of her grandfather. This cannot operate *oppressively* on the defendants, for the court will take care that the *charge* for the support be fair and reasonable.

I shall, therefore, declare that the said home farm mentioned in the will of Adam Pease, is charged with the reasonable maintenance and support of Charlotte Stillwell; and that a master of this court be directed to inquire and report what annual sum is requisite for such reasonable maintenance, and what amount is

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now due to said Charlotte on that account, and what is the net value of the yearly rents and profits of the said farm as it now exists.

THE TRUSTEES of the ASSOCIATE REFORMED CHURCH in Newburgh, and the TRUSTEES of the ASSOCIATE REFORMED CHURCH in Little Britain, v. THE TRUSTEES of the THEOLOGICAL SEMINARY at Princeton.

THE general synod of the Associate Reformed church have, by the constitution of the said church, no authority to do any act, or make any regulation, which interferes with the established order of the church.

THE act of union between the general synod of the Associate Reformed church and the general assembly of the Presbyterian church, adopted on the twenty-first day of May, eighteen hundred and twenty-two, is invalid.

A transfer of the funds of the church, as a consequence of the said union, and necessarily connected therewith, is also invalid.

THAT portion of the Associate Reformed church which refused to acquiesce in the act of union, but maintained its separate and independent existence, retained all the rights and interest in the funds which the church possessed prior to the act of union.

NEITHER the donor of trust property, nor any other person into whose hands it may come, has a right to apply it to any other purpose than that for which it was originally intended.

IT is a well established principle, that when part of any religious association separate and establish a new society, they cease to be members of the original society, and have no longer any claim to their property.

WHERE property has been given in trust for a church not incorporated, it is competent for any person belonging to that church, on behalf of himself and of all others belonging to that church and entitled to the use of the funds, to come into a court of equity to enforce the execution of the trust.

AND if the church consists of various congregations, any one or more of such congregations, being incorporated, may in like manner enforce the execution of the trust.

THE bill is filed by the trustees of the Associate Reformed church, in Newburgh, and the trustees of the Associate Re-

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formed congregation in Little Britain, who sue as well for themselves as in behalf of all the other Associate Reformed churches and congregations in the state of New York, interested and connected in the matters therein mentioned and contained.

The bill states, that the complainants have been severally and respectively incorporated under and according to the provisions of an act of the legislature of the state of New York, entitled, "An act to provide for the incorporation of religious societies," by the corporate names and styles herein before mentioned, and now exist as religious incorporations in the state of New York, using and entitled to the privileges of taking into their possession and custody all the temporalities belonging to their churches, whether the same consist of personal or real estate, and whether the same shall have been given, granted or devised directly to their church, or to any other person for their use; and of suing or being sued by their corporate name or title, in all courts of law or equity, and of receiving, holding and enjoying, all the debts, demands, rights and privileges, and estates belonging to their churches in whatsoever manner the same may have been acquired, in whose name soever the same may be held; and of purchasing and holding real and personal estate for the use of their churches or other pious uses, and other privileges and powers by the said act granted and conferred. That there are now in the state of New York, seventeen other Associate Reformed churches, also incorporated under and according to the provisions of the act herein before mentioned, associated with the complainants, professing the same articles of faith, the same church discipline and government, and governed by one and the same synod or church judicatory, called the Associate Reformed synod of the state of New York, and forming and comprising a distinct body or sect of christians, under the general denomination of the Associate Reformed church; that the constitutional and established form of government of the Associate Reformed church is the presbyterial by several sorts of assemblies composed of pastors and other elders, which assemblies are congregational, classical and synodical, in a just subordination

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f the congregational assemblies to the classical, and of the classical assemblies to the synodical; that the congregational assemblies consist of the minister or ministers and elders of a particular congregation, and are called sessions; that the classical assemblies are composed of all the ministers within a certain district, each accompanied by a ruling elder, commissioned from the session, and are called presbyteries; that a synodical assembly consists of several presbyteries met together, and is called a synod. And it is provided by the constitution and articles for the government of said church, that when the multiplication of presbyteries and distances from each other render impracticable to meet all in one synod, that they be divided into two or more synods, as circumstances may require; that in such case all the particular synods meet together by presbyterial delegation in one general synod; and it is further provided, that neither a particular synod nor such general synod, can do any act affecting the general interests of the church, without submitting the same to the presbyteries for their judgment therein. That in the year eighteen hundred and one, the Associate Reformed church, consisting of and comprising about thirty congregations, with settled ministers, was divided into seven presbyteries, viz. the presbytery of Washington and the presbytery of New York, in the state of New York; the first presbytery of Pennsylvania, the second presbytery of Pennsylvania, the first and second presbyteries of Carolinas and Georgia, and the presbytery of Kentucky; and the said presbyteries met together and formed one synod, called the Associate Reformed synod. That on or about the second day of June, in the year eighteen hundred and one, the said The Associate Reformed synod, agreed upon and adopted the following resolutions:

First, That a minister of this church be sent to Great Britain and Ireland, or either of them, to procure a competent number of evangelical ministers and probationers, and that his expenses be defrayed from the synodical fund.

Second, That he be authorized to procure a number of pious and intelligent students of divinity, who shall engage to repair,

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after the completion of their studies, to the United States, to place themselves under the direction of this synod.

Third, That he be further authorized and enjoined to solicit donations in money, for the purpose of erecting and maintaining a theological seminary, for the education of youth for the holy ministry.

Fourth, That according as the moneys in his hands may permit, he be also authorized to purchase a library for the seminary, and a collection of those books which are most useful and useful for this synod, to be distributed among the ministers and students as shall hereafter be directed; and to solicit donations of books for both these purposes.

And in pursuance of said resolutions, chose and appointed the reverend John M. Mason for the said mission, and directed the payment of the expenses of the said John M. Mason; and also provided for the supplying of the collections at New York, during the absence of their pastor, the said John M. Mason, at the expense of the said synod.

The bill further states, that in pursuance of the said resolutions and appointment, the said John M. Mason procured in Great Britain, in the year eighteen hundred and one, to be received and collected, for the use of the theological seminary of the Associate Reformed church, the sum of five thousand five hundred and forty-six dollars and ninety-three cents; and also received donations of books valued at three hundred and sixty-six dollars and seventy-six cents. That of the money collected and received, the sum of four thousand one hundred and thirty-four dollars was expended by the said John M. Mason for the purchase of books for a library, for the said theological seminary, which were brought, together with the said money received in Great Britain, to the city of New York, in the year eighteen hundred and two.

That large collections in the several Associate Reformed churches of the United States, and large contributions and donations from individual members of said churches, were made and received for and appropriated to the endowment and

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ishment of a theological seminary of the Associate Reformed church.

That soon after the return of the said John M. Mason from Great Britain, a theological seminary of the Associate Reformed church was established in the city of New York, which received and was endowed with the books herein before mentioned, and with the funds from time to time collected and contributed for its use, and large additions were, from time to time, made to the library of the said theological seminary; and the complainants state and charge that the several collections, contributions and donations before mentioned, were made from and by the members of the Associate Reformed church, a distinct and asparate religious sect or denomination of christians, and were intended in all cases, by the donors, for the special and particular use of that particular church or denomination, and became and was the common property of the Associate Reformed church.

That in the year eighteen hundred and two, the said Associate Reformed synod, with the assent and concurrence of the presbyteries, was, by the resolutions and determination of the said synod, divided into four particular synods, and a general synod constituted and appointed, agreeably to the constitution and articles of the church, according to the following plan :

First, That the presbyteries of New York and Washington be constituted into one synod, to be called the synod of New York.

Second, That the first presbytery of Pennsylvania be divided into two presbyteries, to be called the presbytery of Philadelphia and the presbytery of Big Spring; and that these presbyteries constitute one synod, to be called the synod of Pennsylvania.

Third, That the second presbytery of Pennsylvania be hereafter called the presbytery of Monongahela, and together with the presbytery of Kentucky, constitute one synod, to be called the synod of Scioto.

Fourth, That the first and second presbyteries of the Caro-

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linas and Georgia constitute one synod, to be called the synod of the Carolinas.

Fifth, That the aforesaid arrangements take place from and after the adjournment of the present meeting of the synod, and that the general synod hold their first meeting at Greencastle, on the last Wednesday of May, in the year eighteen hundred and four. That the said meeting was accordingly held, and that the general synod continued to meet annually, on their own adjournments, until the year eighteen hundred and twenty-two.

That in the year eighteen hundred and twenty, the synod of Scioto separated and withdrew from the jurisdiction of the general synod, without the consent of the general synod; and that in the year eighteen hundred and twenty-one, the synod of the Carolinas was separated from the said general synod, and constituted an independent synod, with the consent of the said general synod.

The bill further states, that by the common consent of the church, the supreme judicatory of the Associate Reformed church acted as trustees for the church, and possessed and exercised a general superintendence and control over the property and funds of the church and of the seminary, until the year eighteen hundred and twenty-two; and that under their direction the books and library of the seminary were in the immediate custody and possession of John M. Mason, until the removal of the said John M. Mason from the city of New York, and after his removal they were in the immediate custody of some person or persons connected at that time with the Associate Reformed church, but whose names are unknown to the complainants; but the complainants state the fact to be, that they were kept in New York, in the custody of the said John M. Mason, and of the person or persons who succeeded him as the agents of the said Associate Reformed church, or officers of the theological seminary of the Associate Reformed church.

That in the year eighteen hundred and twenty-one, a proposal was made by the general assembly of the Presbyterian church, to the general synod of the Associate Reformed church,

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to unite the churches, on the basis and articles of union hereinafter set forth ; and that said proposal and articles of union were by the resolution of the said general synod, in pursuance of the constitution of the Associate Reformed church, referred to the consideration of the different presbyteries of the Associate Reformed church, with an injunction to the said presbyteries to report their judgment thereon, to the said general synod, at their next meeting.

That at the next meeting of the general synod, in the year eighteen hundred and twenty-two, three presbyteries out of the five represented in the said general synod, reported their dissent and judgment against the proposal and articles of union ; that the presbyteries opposed to the union, were not fully represented in said general synod ; that the general synod proceeded to the consideration and decision of the question of the union, and that the articles of union hereinafter set forth, were adopted by a majority of one vote of the delegates who voted on the question, but by a minority of the delegates present.

That the articles of union adopted by the said general synod in a manner aforesaid, were as follows :

First, The different presbyteries of the Associate Reformed church shall either retain their separate organization, or shall be amalgamated with those of the general assembly, at their own choice ; in the former case, they shall have as full powers and privileges as any other presbytery in the united body, and shall attach themselves to the synods most convenient.

Second, The theological seminary at Princeton, under the care of the general assembly, and the theological seminary of the Associate Reformed church, shall be consolidated.

Third, Whereas, moneys to the amount of between nine and ten thousand dollars, which were given to the general synod of the Associate Reformed church, and of which the interest or product only, was to be applied to the support of a theological seminary, were necessarily used in the current expenses thereof, which moneys so expended, were assumed by the synod as its own debt, at an interest of seven per cent ; the united body agree to make a

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joint effort to repay the same, and will apply the interest accruing thereon, to the maintenance of a professorship of biblical literature in the seminary at Princeton, analogous to that which now exists in the Associate Reformed church; and until such professorship shall be established, the said interest or product shall be used for the general purposes of the seminary.

Fourth, The theological library and funds belonging to the Associate Reformed church, shall be transferred and belong to the seminary at Princeton.

That the Reverend Mr. Smith, in behalf of himself, and Messrs. Otterson, Forrest, McCullough and Lefferts, by the permission of the said general synod, entered the following protest upon the minutes thereof:

Whereas, the plan of union agreed upon by the committees appointed by the general assembly of the Presbyterian church, and the general synod of the Associate Reformed church, referred by the latter, in May, eighteen hundred and twenty-one, to their respective presbyteries, was at their meeting on May, twenty-first, eighteen hundred and twenty-two, adopted by the general synod of the Associate Reformed church; now, therefore, the undersigned, for the glory of God, in maintaining the purity of the discipline, worship, doctrine and government of his house; for the preservation of their own characters, and for the exoneration of their own consciences, hereby do, in the name of the Lord Jesus Christ, most solemnly and deliberately, protest against the said resolution, for the following reasons, to wit:

Because, the expression of the sentiments with regard to the union, both by the congregations and presbyteries, a large majority of the former and a majority of the latter being decidedly opposed to it, was entirely disregarded in the determination.

Because, the adoption of said plan, instead of being an expression of the sentiments of the Associate Reformed church, was effected by the delegates from the presbytery of Philadelphia alone, only one member from the remaining four presbyteries voting in its favor.

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Because, there is no likelihood, from the diversity of sentiment that exists between the protesters and members of the general assembly, respecting many of the doctrines of the gospel as well as the government of the church, and many other things permitted by them, in direct opposition to the standards of their church, that the union could be accomplished with those feelings of reciprocity that ought to characterize christian churches in forming so close and intimate a connection.

The bill further states, that immediately after the adoption of the resolutions and articles of union, in manner before mentioned, the library and books herein before mentioned, and the funds of the Associate Reformed church, and of the theological seminary of the Associate Reformed church, were all transferred, delivered, and paid over to the theological seminary at Princeton, and have ever since been possessed, used and enjoyed by the said theological seminary at Princeton.

The complainants respectfully charge and submit that the act and vote of union with the Presbyterian church, by the general synod of the Associate Reformed church, was void and of no effect, being contrary to the constitution and established articles of government of the said church, in opposition to the vote and judgment of a majority of the presbyteries of said church duly and solemnly given and expressed, and also contrary to the wishes of a large majority of the congregations and members of the said Associate Reformed church; and that the granting, ceding and delivery of the library and funds aforesaid, was unlawful and void, not only for the causes next herein before mentioned, but also because the said general synod were merely the trustees of the Associate Reformed church, entrusted with the said library and funds only for the special uses and purposes for which the same were collected and intended by the donors, and had no authority to give, cede or dispose of the same, either to the theological seminary of another church, or to any other person or persons whatsoever.

That a large majority of the Associate Reformed churches in the state of New York, refused to concur in the said union,

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but continued and still continue in the same established form and order of the Associate Reformed church and church government, maintaining the uninterrupted and unchanged existence of the separate and distinct church or denomination called and known as the Associate Reformed church; and the complainants respectfully submit, that the separation of some portion of the congregations and members of the Associate Reformed church, from the said church, and their union and junction with the Presbyterian church, though it diminished the numbers and strength, had no effect whatever to take away or destroy the existence or continuance, or in any manner impair the rights, of the said Associate Reformed church.

That the Associate Reformed church has increased in ministers and members since the year eighteen hundred and twenty-two, and now comprises more than thirty congregations, under the care of four presbyteries, viz. the presbyteries of New York, Saratoga, Washington and Caledonia, all under the superintendence and government of the synod of New York, and being and continuing the Associate Reformed church, in the same form and in all essential respects, as it was in the years eighteen hundred one and two, when the books, library and funds aforesaid were principally acquired.

That the Associate Reformed church have now a theological seminary established at Newburgh, in the state of New York, in direct connection with the Associate Reformed church, and is maintained by the said church, and devoted to the education of students of divinity designed for the ministry in said church.

That the cession of the said library and funds, was and is wholly unauthorized and void, and transferred no property therein to the theological seminary at Princeton, or to the trustees thereof; and the complainants and those in whose behalf they claim, being the Associate Reformed church, are owners thereof, and of right entitled to the property therein, and to the possession thereof.

That at the same time, with the said library and funds, or money, all the accounts, records, books, vouchers and catalogues

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appertaining or relating to the same, were also transferred and delivered over to the said theological seminary at Princeton, or the trustees, so that the complainants, or those in whose behalf they claim, are unable to state or set forth particularly and with certainty the titles or numbers of books composing the said library, or the value thereof, or the amount of the said funds, but from information and belief, that the books composing said library were then of the value of about nine thousand dollars, and the said funds were of the amount of about two thousand dollars.

That ever since the said transfer, the said theological seminary at Princeton have had, and still have, the possession and use of the said library and funds under the care, charge and control of the trustees of the said theological seminary.

The prayer of the bill is, that the said, the trustees of the theological seminary at Princeton, may be decreed and directed to deliver over to the complainants the said library and funds, and to pay to the complainants all the interest accruing on said funds since they received the same, together with a reasonable compensation for the use of said library; and may also be decreed to deliver over to the complainants all the account books, vouchers, catalogues and documents appertaining to said library and funds; and that the complainants may have such other and further relief in all and singular the premises, as the nature and circumstances of the case may require, and to the court shall seem most meet.

The defendants, by their answer, admit the material charges in the bill touching the organization of the Associate Reformed Church, the collection and appropriation of the funds, the adoption of the act of union, and the transfer of the library and funds in pursuance thereof; but they insist that the act of union as made by the supreme judicatory of the Associate Reformed Church, upon a matter within its cognizance and control, and that the said act was constitutional and valid. That if the said act of union was, as is alleged in the bill of complaint, in oppo-

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sition to the vote and judgment of a majority of the presbyteries of the the said Associate Reformed church, (which the defendants do not admit,) that the validity of the said act of union, and the transfer of the library and funds in pursuance thereof, was not thereby affected or in any wise impaired, inasmuch as by the constitution of the said church, it is the province of the general synod not only to decide questions respecting doctrine and discipline, but also in general to preside over the religious interests of the church at large, and to establish such regulations relative thereto as to them shall seem meet; that the power of the presbyteries, under the said constitution, touching such universal and permanent regulations as may be made by the said synod, is advisory merely; and that the action of the synod is by the constitution of the church binding and operative, whether the inferior judicatories concur therein or not.

The defendants further in answering say, that soon after the formation of the said union, and in pursuance of the first article thereof, a large number of congregations forming a part of the Associate Reformed church, and under the care of the general synod at the time of the union, became united with the Presbyterian church, and still continue in union therewith; and they insist, that inasmuch as the said congregations acted under the direction and in accordance with the decision and decree of the supreme judicatory of the Associate Reformed church, of which they then formed a constituent part, they are not separated from the said church, nor have they forfeited any of their rights, privileges or immunities as members of the said church, nor have they in any wise seceded therefrom, but that they are in fact still members of the said church, now united under the said articles of union with the Presbyterian church, and that they are entitled to all the rights, privileges and immunities to which they were entitled as members of the Associate Reformed church at the time of the said union, and the more especially, as the said Associate Reformed and Presbyterian churches are one in doctrine, discipline and form of government.

They further say, that in pursuance of the articles of union,

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the theological seminary of the Associate Reformed church and the theological seminary at Princeton under the care of the general assembly of the Presbyterian church, were consolidated, and so continue ; that the said library and funds were transferred to and held by the defendants, in trust, and for the benefit of the said seminary ; and they insist that the general synod of the Associate Reformed church had full power and authority to make the said transfer for the purpose aforesaid, and that the trust fund is not diverted from the purpose for which it was intended by the donors.

They further insist, that the synod of New-York is not identical with the general synod of the associate Reformed church, nor is the synod of New-York invested with the powers, duties and titles to property of the said general synod, nor are they entitled to the possession of the library and funds in the hands of the defendants, even if the act of union and the transfer of the said library and funds in pursuance thereof, are null and void.

The cause was heard upon bill, answer, replication and proofs.*

Frelinghuysen and I. H. Williamson, for complainants.

Southard and H. W. Green, for defendants.

Cases cited by complainants' counsel. *Prec. in Chan.* 592 ; 3 *Vesey*, 70 ; 6 *Vesey*, 773 ; 16 *Vesey*, 321 ; 3 *Mer.* 351 ; 2 *Kent*, 287 ; 1 *Sch. and Lef.* 261 ; 11 *Vesey*, 428 ; *Cooper's Eq. Pl.* 39, 41 ; 2 *Sim. and S.* 267 ; 2 *Peters*, 579 ; 3 *Burr.* 1871 ; 1 *Dess.* 154 ; 2 *Paige*, 43 ; 3 *Mer.* 417 ; 9 *Wend.* 394 ;

* The cause was originally argued before chancellor Vroom, at July term, 1836. At October term he directed a re-argument, mainly, as it was understood, upon the question whether, supposing the act of union to be invalid, the complainants were entitled to the possession or benefit of the trust property. The cause was again argued before chancellor Dickerson, at a special term, in March, 1837.

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2 *Kent's Com.* 279; 2 *Atkyns*, 405; 16 *Mass.* 488; 4 *Mass.* 389; 2 *Wend.* 109.

Cases cited by defendants' counsel. 3 *Peters*, 100, 114; 4 *Wheaton*, 1; 1 *Bos. and Pull.* 43; 2 *Kent's Com.* 287; 3 *Dess.* 582; 3 *Vesey and B.* 180; 2 *Mad.* 181; 1 *Tamlyn*, 14; 5 *Con. Eng. Chan.* 260; 1 *Turn. and Russ.* 270.

THE CHANCELLOR. The complainants in this suit are duly incorporated, under an act of the legislature of the state of New-York, entitled, "An act to provide for the incorporation of religious societies." And there are seventeen other Associate Reformed churches in the state of New-York, incorporated under the same act, associated with the complainants, professing the same articles of faith, the same church discipline, and governed by one and the same synod, or church judicatory, called "The Associate Reformed synod of New-York," and forming a distinct body of christians, under the general denomination of "The Associate Reformed church." And their established form of government is presbyterial, having sessions, presbyteries and synods.

In the year eighteen hundred and one, they had thirty congregations, with settled ministers, divided into seven presbyteries, viz.: The presbytery of Washington and of New-York, in the state of New-York; the first and second of Pennsylvania; the first and second of Carolinas and Georgia, and one of Kentucky; and those presbyteries met and formed a synod, called "The Associate Reformed synod."

On or about the second of June, A. D. eighteen hundred and one, and before any of these churches were incorporated, this synod resolved to send the Rev. John M. Mason to Europe, "to solicit donations in money for the purpose of erecting and maintaining a theological seminary for the education of youth for the holy ministry," and "to purchase a library for said seminary, and a collection of those books which are most needful and use-

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for this synod, to be distributed among their members and
lents," &c.

Under this resolution, the said John M. Mason proceeded to
at Britain and collected some moneys and a library, with
ch he returned to the city of New York in eighteen hundred
two.

Large collections were also made in this country and appro-
ted to the endowment and establishment of a theological
inary of this church, which was established in the city of
v York, and endowed with those books and funds, and with
r funds received from time to time.

In eighteen hundred and two, this Associate Reformed synod
divided into four particular synods, and a general synod
at the same time formed, to hold its first meeting at Green-
le, on the last Wednesday of May, eighteen hundred and

This general synod met annually, and the church continued
ler this organization until eighteen hundred and twenty-two,
ing all which time this library and the funds of the church,
e in the custody of the general synod, who by the consent of
church, exercised a general superintendence over their pro-
y and funds.

In eighteen hundred and twenty-two, the general synod
ned an union with the general assembly of the Presbyterian
rch, by the following articles of agreement.

1. "The different presbyteries of the Associate Reformed
rch, shall either retain their separate organization, or shall
amalgamated with those of the general assembly, at their
n choice. In the former case they shall have as full powers
l privileges as any other presbytery in the united body, and
ll attach themselves to the synods most convenient."

2. "The theological seminary at Princeton, under the care of
general assembly, and the theological seminary of the Asso-
s Reformed church, shall be consolidated."

3. "Whereas moneys to the amount of between nine and ten
usand dollars, which were given to the general synod of the

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Associate Reformed church, and of which the interest or product only was to be applied to the support of a theological seminary, was necessarily used in the current expenses thereof, which moneys so expended were assumed by the synod as its own debt at an interest of seven per centum; the united body agree to make a joint effort to re-pay the same, and will apply the interest accruing thereon, to the maintainance of a professorship of biblical literature in the seminary at Princeton, analagous to that which now exists in the Associate Reformed church, and until such professorship shall be established, the said interest or product shall be used for the general purposes of the seminary."

4. "The theological library and funds belonging to the Associate Reformed church, shall be transferred, and belong to the seminary at Princeton."

Immediately after this union the library and funds of the Associate Reformed church, and of their seminary, were transferred, and delivered over to the theological seminary at Princeton, where they have since remained.

The bill in this case is filed to recover the possession of said library and funds, and a compensation for the use of the library and interest on the funds. Such is the general state of the facts, apparent from the pleadings and evidence in the case. And although it is deeply to be regretted that causes of this kind should arise, yet the manner in which this has been conducted, shows clearly that the parties seek only for truth and justice, and it furnishes striking evidence that the lines which mark the rights of property may be so indistinct, that men of the purest morals and most enlightened judgments, may honestly differ as to their true position.

In the investigation of this subject, it is necessary to inquire,

1. Whether the Associate Reformed church, for whose use these books and funds were given, still exists?

2. Whether they are still entitled to the use and enjoyment of those books and funds as they were before the union? and,

3. Whether these complainants have made a proper case for the interference of this court, and whether they are the proper parties in court?

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As to the first point, I think no serious doubt can exist. The answer upon this subject admits "that several of the Associate Reformed churches, under the care and supervision of the general synod of the Associate Reformed church at the time of the aforesaid union, refused to concur therein, but continued, and still continue separate and distinct from the Presbyterian church, retaining the name of the Associate Reformed church. That certain of the said churches have united under the same church discipline and government, and are governed by one and the same synod or church judicatory, called the Associate Reformed synod of the state of New-York." And in addition to this admission, all the witnesses speak of "the Associate Reformed church" as an existing church.

The next inquiry is, whether they are still entitled to the use and enjoyment of these books and funds as they were before the union? and this involves the important question as to the power or authority of the general synod to form this union.

The Associate Reformed church has existed in this country for many years, as a separate or distinct branch of the christian church.

In the year seventeen hundred and ninety-six it was composed of several presbyteries, and one synod, called "the Associate Reformed synod," which consisted of those presbyteries met together for mutual assistance, and for managing the affairs of the church under its care.

This form of government by presbyteries and one synod, continued until eighteen hundred and two, during all which time this associate synod was the supreme head of the church, as to its government and order. In eighteen hundred and two, the synod, by the assent of the presbyteries, resolved to divide itself into four particular synods, and to form a general synod, which held its first meeting at Greencastle, in Pennsylvania, on the last Wednesday of May, eighteen hundred and four.

This general synod was composed of delegates from the several presbyteries, with powers expressly defined in their constitution; and to that definition of their powers I refer, to ascertain

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their extent, with this remark, that their powers were delegated and not inherent.

By the seventh section of the sixth chapter of their charter government, it is declared that "the general synod thus constituted, is in every respect to the particular synods, what the latter are to the presbyteries within their bounds. It is also the province of the general synod to decide questions respecting doctrine and discipline, to bear testimony against errors and immoralities, to correspond with other churches, and in general to preside over the religious interest of the church at large. No regulation intended to be universal and permanent, shall be established without previously transmitting them to the several presbyteries, that they may have time to consider and render their judgment thereon."

As this definition of the powers of the general synod refers to the power of the particular synods over the presbyteries within their bounds, it becomes necessary to inquire as to that power.

By the second section of the same chapter, after reciting a variety of specific powers, it is declared that they have power "generally to make such regulations, with respect to presbyterial sessions, and people under their care, as do not interfere with the established order of the church."

It is, therefore, evident that the particular synod can do no more than that which shall "interfere with the established order of the church." And as the general synod is in every respect, to the particular synods, what the latter are to the presbyteries within their bounds, I conclude that their powers are not more extensive than those of the particular synod; unless upon a fair construction of the other part of the seventh section above quoted, that further powers can be inferred. These further powers are "to decide questions of doctrine and discipline, to bear testimony against errors and immoralities, to correspond with other churches, and in general to preside over the religious interests of the church at large." Here is no authority given to interfere with the established order of the church. And as to the last clause of said article respecting the establishment of regulations, which are intended

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to be universal and permanent, I consider that as a limitation, rather than a grant of power.

From these premises, I conclude that the general synod had no authority to do any act, or make any regulation which should interfere with the established order of the church.

In order to apply this principle to the articles of union, it is necessary to examine those articles, and see if they do in fact interfere with the established order of the church. And in order to understand their true bearing, they are to be considered as valid, and of course obligatory upon the several presbyteries composing the general synod; and in that view, let us inquire what would have been their effect.

By the second article, the two seminaries are consolidated, and of course one of them ceased to exist.

By the fourth article, the theological library and funds belonging to the Associate Reformed church, are transferred, and belong to the seminary at Princeton, and consequently, it is the seminary of the Associate Reformed church that ceased to exist.

By the third article, it appears that the general synod of the Associate Reformed church had become indebted to their church in the sum of nine or ten thousand dollars, and by that article it is provided, "that the united body agree to make a joint effort to repay the same." Here we find that the two churches are united and form but one body or church, and of course one of the churches must have ceased to exist, and the question is, which church survived?

We have already seen, by the fourth article, that the theological library and funds of the Associate Reformed church, are transferred, and belong to the seminary at Princeton; and by the second article, that the theological seminary of the Associate Reformed church had ceased to exist, and therefore, it cannot be presumed, that the Associate Reformed church survived, having already given away her library and funds.

But this view of the case is confirmed by the first section, which provides "that the different presbyteries of the Associate

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Reformed church, shall be amalgamated with those of the general assembly; or if they choose, they shall retain their separate organization, in which case, they shall have as full powers and privileges as any other presbytery in the united body, and shall attach themselves to the synods most convenient;" thus giving to a presbytery of the Associate Reformed church, the privilege of being attached to the most convenient Presbyterian synod, and to the general assembly.

Upon a fair construction of these articles of union, it is manifest that the Presbyterian church was the body that was to survive; and this was evidently the view taken of it by those who formed the union, for by reference to the minutes of their proceedings in May, eighteen hundred and twenty-two, after the adoption of the articles of union, I find that the general assembly of the Presbyterian church, invite all the delegates at the synod, to take their seats, as members of the general assembly, which is accepted; and it is resolved by the general synod of the Associate Reformed church, "that all the minutes and documents, together with a complete series of the published extracts belonging to the general synod, be, and they are thereby directed to be, by the clerk deposited with the session of the congregation of Spruce street church, subject to the future disposal of the general assembly of the Presbyterian church."

It was the obvious intention of those who formed the union, and it is evident from the articles of union themselves, and the proceedings had thereon, that the Associate Reformed church should be merged in the Presbyterian church, to all intents and purposes; and such has been the fact, with regard to those who came in under the union; and such would have been the effect, as to the whole church, if those articles of union had been considered by all as obligatory. By this act they not only interfere with the established order of the church, but actually destroy the church of which they are the highest judicatory.

It has not been contended, nor do I think that it can be, that the power of the general synod of the Associate Reformed church had this extent. Chancellor Dessasure very justly re-

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marks, "that one of the fundamental rules of incorporate bodies is, that the members are not to do any act which may destroy its existence, or injure its privileges." And the reason of the rule applies with equal force to voluntary associations.

I therefore conclude, that the union is invalid, and that the Associate Reformed church still have the same rights and interest in these books and funds, that they had before the adoption of these articles of union.

But it was contended, that the general synod had a right to transfer this library and these funds to the seminary at Princeton, although they might not have had the right to form the union.

I do not think it necessary here to inquire, how far they had the power to dispose of this property; for I consider this transfer of the books and papers, as a consequence of the union, and necessarily connected with it, in all its parts; they must stand or fall together. It cannot be supposed, that they intended to transfer this property as a distinct act, to be considered as valid, although the other parts of the agreement were void.

It only remains to inquire, whether the case presented, be a case proper for the interference of a court of equity; and whether these complainants are the proper parties to ask its aid.

The property in dispute, was originally given for the benefit of the Associate Reformed church, and held in trust for the purpose of erecting and maintaining a theological seminary for the education of youth for the holy ministry; and also for a library for the use of the seminary. By the third section of the original resolution, under which Dr. Mason was appointed, he was authorized and enjoined to solicit donations in money, for the purpose of "erecting and maintaining a theological seminary, for the education of youth for the holy ministry." And by the fourth section, he was "authorized to purchase a library for said seminary, and a collection of those books which are most needful and useful for this synod, to be distributed among their ministers and students, as shall be directed," &c.

Under these resolutions, Dr. Mason obtained these donations,

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and in his report, dated October twenty-sixth, eighteen hundred and two, after stating the amount of moneys received, he remarks, "of the money, the principal part has been expended in the purchase of books, most of which are to be deposited in the library of the seminary; the rest may be disposed of by sale, as the synod shall direct, but cannot be given away, unless their price be replaced, as the whole of the pecuniary donations were made to the seminary exclusively."

And the synod themselves, when applied to by the Lexington academy, for part of these books, resolve, "that they cannot, consistently with good faith, divide the moneys contributed expressly to the seminary they have now instituted nor the library purchased with part of those moneys."

It is, therefore, manifest that this property was trust property, and that neither Dr. Mason, nor any other person into whose hands it might come, had a right to apply it to any other purpose than that for which it was originally intended; and it is the duty of this court, upon a proper application, to see that this trust is not abused.

Let us, then, inquire if these complainants are the proper parties to ask relief in this case. At the time of the acquisition of this property, the Associate Reformed church existed under the same organization that it now exists; but since that time, various parts have separated from the original church, and thereby lost all right and title which they had to this property; for it is a well settled principle, that when part of any religious association separate and establish a new society, they cease to be members of the original society, and have no longer any claim to their property. In eighteen hundred and twenty, the synod of Scio separated from the original church, and the congregations of the presbytery of Big Spring, which were opposed to the union, afterwards attached themselves to that synod. In eighteen hundred and twenty-one, the synod of the Carolinas separated, and by the union a large portion of the church united themselves with the Presbyterian church; but a great majority of the churches in the state of New York, refused to concur in the

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union, and they now consist of more than thirty congregations, under the government of the synod of New York, retaining their separate existence, in the established form and order of the Associate Reformed church; they have a theological seminary established at Newburgh, in connection with and maintained by the church, and this is the identical church for whose use this property was originally given. Who, then, should appear and claim the aid of this court, to restore this property to the use for which the donors intended it?

The general synod is not incorporated, and therefore, cannot act as trustees for this purpose. But the complainants are incorporated, and may be trustees and hold this property for the use of the church, provided the act by which they were incorporated gives them such authority. By the bill it appears, and it is admitted by the answer, that they are entitled "to the privileges of taking into their possession and custody, all the temporalities belonging to their churches, whether the same consist of personal or real estate; and whether the same shall have been given, granted, or devised, directly to their church, or to any other person for their use; and of suing or being sued, by their corporate name or title, in all courts of law or equity; and of recovering, holding, and enjoying all the debts, demands, rights and privileges, and estates, belonging to their churches, in whatsoever name the same may have been acquired," &c.

The bill also charges, and it is admitted in the answer, "that there now are in the state of New York, seventeen other Associate Reformed churches, also incorporated under, and according to the provisions of the said act, associated with the complainants, professing the same articles of faith, the same church discipline and government, and governed by one and the same synod or church judicatory, called the Associate Reformed synod of New York, and forming and comprising a distinct body or sect of christians, under the general denomination of "the Associate Reformed church."

If these different congregations, forming the Associate Reformed church, had not become incorporated, it would have been

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competent for any person belonging to that church, on behalf of himself and all others belonging to that church, and entitled to the use of those books and funds, to have enforced the execution of that trust in this court.

In the case of *Chancy v. May*, *Prec. in Chan.* 592, the court sustained a bill filed by the treasurer and manager of certain brass works, on behalf of themselves and all other proprietors and owners, against the late treasurer and manager, to call them to account for the misapplication of funds.

The case of *Fells v. Read*, 3 *Ves.* 69, establishes the same doctrine.

And in the case of *Beatty and Ritchie v. Kurtz and others* 2 *Peters*, 566, 579, the bill was filed by the complainants, alleging themselves to be trustees and agents for the German Lutheran church, on behalf of themselves and the members of the said church; and it was sustained, although the church has never been incorporated.

If, then, it would have been competent for the members, individually, to have enforced the execution of this trust, for the benefit of the whole, I can imagine no good reason why they should not be authorized to form themselves into corporation for the purpose of more conveniently asserting and enforcing those rights which they had, and could assert in their individual capacity.

In the case of the *Presbyterian church of Bethel v. the Executors of Dounom*, 1 *Eq. R.* 154, "the funds were collected by voluntary subscription, to uphold a church and parsonage for the use of the congregation and ministers, near Poupo river." This church was not incorporated at the time; James Dounom, the surviving trustee, who had possession of the property for a long time, attempted, by his will, to divide it, and divert a part of it for the use of another church. The complainants afterwards became incorporated, and filed their bill against the executors of Dounom, for an account of the property, and the court were of opinion "that Dounom had no right to divert the funds of the society to different purposes than what

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they were originally intended for;" and they decreed "that the funds should be assigned over to the complainants, for the benefit of the Bethel church."

And in the case of the *Canajoharie church v. Leiber, 2 Paige, 43*, the complainants and others, associated for the purpose of building a church, and the defendant agreed to give a lot for the purpose; voluntary subscriptions were raised, and a church built on the premises. Afterwards, the associates were incorporated, and filed the bill in their corporate name; and the chancellor remarked, "that although the agreement to convey this lot was made before the society was incorporated, yet in equity the agreement ought to be carried into effect with the incorporation, which now represents the rights of the original associates."

These authorities confirm the view which I have taken of the case, and satisfy me that these complainants are the proper parties in court; and that they are authorized to receive these books and funds, and to hold them in trust for the use of the church, according to the intention of the donors.

Decree accordingly.



CASES

ABSTRACTED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY,

OCTOBER TERM, 1837.

JOHN MCKELWAY v. JAMES COOK.

M., by indenture, leased to C. at a stipulated rent, a saw-mill with a quantity of water to drive it "equal to six horse power." At the time of executing the lease, it was generally understood, and believed by the lessor that a less quantity of water would constitute a horse power at the site of the mill, than was actually required, and the rent was graduated upon that erroneous assumption. *Held,*

That the complainant must suffer the consequences of his mistake, and that he was neither entitled to charge the defendant a higher rent than that stipulated in the lease, nor to restrain him from drawing a quantity of water equal to six horse power.

Nor will the complainant be entitled to relief although the defendant himself acted at the execution of the lease under the same erroneous impression, unless it appear that he expressly agreed that the stipulated power should be gauged upon such erroneous estimate.

THE complainant, in the bill of complaint by him filed, charges, that he, being the owner of a certain mill site in Trenton, in February, eighteen hundred and thirty-four, one William G. Cook, agent of the defendant, but not then known to the complainant to be such agent, entered into a verbal agreement with him, the purport of which was—1. That McKelway should erect a single saw-mill upon his site, of substantial ma-

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terials, to be of certain dimensions; should furnish water to drive the mill, and should deliver possession of the mill, so furnished, to William G. Cook, or to such person or persons as he should substitute in his place, to occupy and enjoy for five years. 2. That the rent to be annually paid by Cook, or the person substituted by him, should be ascertained upon the completion of the mill, by adding to whatever sum McKelway should pay the Trenton Delaware Falls company for the water furnished, ten per cent. upon the amount of cost of building and materials for mill, and six per cent. on the site, valued at one thousand dollars.

A few days after the making of this agreement, William G. Cook called, with James Cook, the defendant, upon McKelway, and, disclosing his agency, James Cook expressed his approbation of the agreement, and assumed the performance on his part. Doctor McKelway immediately proceeded, under the agreement, to put up the mill, and in the following September completed it, at a cost of two thousand two hundred and forty dollars, and delivered it into the possession of the defendant, who has ever since enjoyed it, under a lease obtained in the following manner :

Soon after making the verbal agreement with the defendant, doctor McKelway requested him to have it put in writing, to which Cook made excuses and occasioned delays, until the twenty-ninth of March, eighteen hundred and thirty-four. At this time all the contracts for building, and furnishing the materials for the mill, were entered into, and the amount it was to cost being thus ascertained, upon again requesting the respondent to put the agreement above stated in writing, Cook proposed, that as all the items of charge which in the aggregate were to fix the amount of the yearly rent, according to the agreement, were now known, a lease, in lieu of the agreement, should be drawn and executed, to be in all things based upon the stipulations of the verbal agreement, to which doctor McKelway assented. The lease follows :

" This indenture, made the twenty-ninth day of March, in

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the year of our Lord eighteen hundred and thirty-four, between John McKelway, of the city of Trenton; county of Hunterdon, and state of New Jersey, of the one part; and James Cook, of the city, county and state aforesaid, of the other part, witnesseth, that the said John McKelway doth demise, grant and lease unto the said James Cook, his executors, administrators and assigns, all that lot of land situate in the said city, and adjacent to the Delaware Falls company's canal or raceway, with the saw-mill thereon erecting, which is to be built two stories high and completely finished in all its parts by the first day of June next ensuing, at the proper costs and charges of him the said John McKelway, and the said saw-mill to be supplied with water from the said Delaware Falls company's canal or raceway with a quantity equal to six horse power, the rent of which said water is to be paid by him the said John McKelway to the said Delaware Falls company: To have and to hold the said premises for the term of four years and ten months from the first day of June next ensuing, yielding and paying therefor yearly and every year (by quarterly payments) during the said term, the yearly rent of four hundred and forty-six dollars; that is to say, the sum of one hundred and eleven dollars and fifty cents on every quarter day from the commencement of this demise, except the first payment which falls due on the first day of July next ensuing, that being only one month's rent will be the sum of thirty-seven dollars and sixteen and two-thirds cents—And the said James Cook doth for himself, his heirs, executors and administrators, covenant with the said John McKelway, his heirs and assigns, that he, the said James Cook, his heirs, executors and administrators, shall pay to the said John McKelway, his heirs and assigns, the aforesaid yearly rent of four hundred and forty-six dollars, at the times appointed as aforesaid: And also that he the said James Cook, his executors, administrators or assigns, will during the said term, at his and their proper costs and charges, well and sufficiently repair all and every damage or damages which the said premises may sustain during the said term, so far as the same may be occasioned through the

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carelessness or inattention of him the said James Cook, or his heirs or assigns: And the said John McKelway doth for himself, his heirs, executors and administrators, covenant with the said James Cook, his heirs and assigns, that he the said John McKelway, his executors, administrators or assigns, will during the said term, at his and their proper costs and charges, well and sufficiently repair and keep in repair the said premises so far as the same may become deranged through what is usually termed common or natural wear and tear: And also that the said John McKelway, for himself, his heirs, executors and administrators, guarantees that the said saw-mill shall have such a supply of water as to enable the said James Cook or his heirs or assigns to saw lumber therein ten months in each and every year from the commencement of this demise, and that an ample supply of water shall be had for eleven months in each and every year during the term aforesaid: But if there should, through any cause or causes whatever, be a failure of water so that the said James Cook, or his heirs or assigns, could not reap the advantage of the use of the said saw-mill and water for the time guaranteed, then a reduction of the rent shall take place in proportion to the time wanting in the guarantee as aforesaid, both as to the saw-mill and water: And lastly, that the said James Cook, his executors, administrators or assigns, at the expiration of the said term, shall and will yield up the said premises in good and sufficient repair (destruction by fire, war and tempest always excepted) unto the said John McKelway, his heirs and assigns.

The bill then proceeds to explain the clause of guaranty contained in the lease, by reciting parts of the eighth, ninth, and tenth articles of the printed proposals by the Trenton Delaware Falls company for renting their water, (which proposals are made part of the bill,) and charges, that it was under the provisions and obligations of those proposals that Doctor McKelway rented of the company the water for the mill, and that the guaranty in the lease was intended merely for the purpose of introducing the same, or similar obligations, between himself and

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Cook, as his lessee, as under the proposals subsisted between the company and himself, as their lessee—and that the guaranty was not intended to impose upon Doctor McKelway the burden and expense of furnishing a greater quantity of water than that mentioned in the lease, should that prove insufficient to propel the mill, without an increase of rent to be paid, in proportion to the increased quantity of water called for.

Having thus explained the guaranty, the bill charges, that on the day of the execution of the lease, and at all times previous, it was given out by the Trenton Delaware Falls company, and was notoriously and universally the understanding of the mill owners upon their raceway, and of persons connected with, or in the employ of the company, and was undoubted and uncontradicted, that at the site of the said mill nine square inches of water under a three feet head constituted a horse power. And it is expressly alleged, that in several conversations between McKelway and Cook, both before, subsequent to, and about the time of the execution of the lease, it was stated and distinctly understood between them, that nine square inches under three feet head, drawn from the company's raceway at the site of McKelway's mill, was a horse power, according to the full meaning of the term as found in the lease.

By the sixth article of the proposals of the company, it is made obligatory upon all of their lessees to make and maintain in good repair the flumes and head-races of their respective mills, and also to construct and keep in repair an aperture and gate through which the water was to be drawn and measured, and for the neglect of so doing summary and legal remedies were stipulated. On the fifteenth of April, eighteen hundred and thirty-five, the company ordered a committee of their body to set the apertures, who proceeded under the order and set that of the complainant's mill on the fourth of September following. The aperture so set was sixty-five inches in length by one inch and three-eighths of an inch in width, forming an area, or opening, of eighty-nine and a quarter square inches, and was adjusted under a head of twelve inches, being equivalent to fifty-four

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square inches of aperture under a three feet head, or to six horse power, according to the understanding of the parties at the date of the lease. It was then found that the power thus obtained would not drive the mill. McKelway then proposed to lease as much more as was necessary of the company, if Cook would obligate himself to pay the same increase of rent that the complainant would have to pay to the company. This Cook refused to do, but took out the aperture, and drew the water without measure from the company's raceway, contrary to their rules and proposals, binding upon McKelway, and thus exposing him to actions for damages.

The bill further charges, that in drawing the water thus upon the wheel of the mill without measure, the defendant drives the mill with such violence and irregularity as to cause unusual wear and damage to the machinery, and to jar, weaken, and irretrievably damage the mill itself.

It is further charged, that Cook is in moderate circumstances, with but trifling if any real estate, and would not be able to respond in damages at law for the injury sustained by the mill, &c.

The bill prays an account for all damages the complainant has already sustained by the unlawful conduct of the said Cook, and also an injunction :

1. To restrain Cook from drawing excessive, unmeasured and unauthorized quantities of water from the raceway of the company upon the wheel of the mill, thereby jarring, weakening, and doing permanent injury to it.
2. Also, from using any other form or substance of aperture than that prescribed by the proposals of the company.
3. Also, from using a larger aperture than will supply a quantity of water equal to six horse power, according to the meaning of the lease, to wit, fifty-four square inches under a three feet head.

The defendant, by his answer, admits that McKelway owned the site, as charged, and that, having it in contemplation to erect a saw-mill thereon, some time in February, eighteen hundred and

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thirty-four, William G. Cook proposed to him to rent the mill, and offered to pay therefor an annual rent, to amount, in addition to the sum which the doctor would have to pay for the water to the company, to ten per cent. on the actual cost of the mill, and sixty dollars per annum for the site. Before and at that time the defendant and his brother, William G. Cook, contemplated entering into partnership in the business of sawing lumber; and the defendant believes that the proposal was made by his brother, with the view of obtaining the mill for himself and the defendant; but no contract of partnership was then actually entered into between them, nor was there ever after; nor was his brother bound to admit the defendant to any benefit from the contract with the doctor; and denies that William G. Cook was his agent in making the agreement, or that he ever recognized him as such. And further, that if the agreement, as set forth in the bill, was made, it is without validity; or if binding upon W. G. Cook, still it was not binding upon the defendant, having been made without his procurement.

Admits that the mill was erected, but whether in pursuance of any agreement between W. G. Cook and doctor McKelway or not, the defendant alleges himself to be ignorant; but believes the mill, as built, to be variant in its construction and dimensions from that contemplated by the doctor at the time of the alleged agreement. Subsequent to that time, Wm. G. Cook proposed to defendant to take the mill of the doctor, and carry on the business in his own name, and advised him so to do. Whereupon, defendant expressed to his brother his willingness to take a lease on the mill for a term of years; but denies that he ever recognized W. G. Cook as his agent in making the alleged agreement, or that he ever assented to the terms of such agreement; and does not recollect of any agreement, at any time, made between the doctor and himself, recognizing the terms of that agreement; but on the contrary charges, that being ignorant of the quantity of water requisite to drive the mill, and fearful of unusual expense in its erection, thereby enhancing the rent beyond his willingness to pay, and being unwilling to take a

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lease at an uncertain rent, he insisted that some certain rent should be fixed upon before entering into any lease for the mill. Defendant admits that the doctor frequently applied to him to enter into written articles of agreement respecting the lease, but that he refused to do so until a fixed price should be agreed upon as rent; and for proof that no binding agreement existed between them, he charges, that while these negotiations were pending, the doctor stated to him, that unless he assented to the proposals respecting the lease, made to him by the doctor, that he would rent the premises to some other person; and upon his refusing to comply, the doctor did offer the mill for rent or sale.

On or about the twenty-ninth of March, eighteen hundred and thirty-four, doctor McKelway proposed to Cook to build the mill two stories high, instead of one, as originally proposed, and to lease him the mill for four years and ten months, at a fixed rent, to which proposal he acceded, and a verbal contract was made, in pursuance of which the lease was executed, as set out in the bill. Neither admits or denies but that the amount of rent agreed upon between them, and inserted in the lease, was ascertained by the complainant in the manner alleged in the bill; but insists that it was not communicated so to him, and was not the basis of the contract on his part; that so far as he acted, it was upon a simple proposal to pay a stipulated rent, without reference to any previous contract; that he, at that time, did not know the rent charged by the Delaware Falls company, for the use of the water necessary for the mill, nor was any exhibit made to him relative thereto; that he then was, and is, ignorant of the cost of the mill, but believes that at the date of the lease, the cost of the mill was unknown to the complainant, and that material changes were made in its construction, after the date of the lease, whereby the cost was materially enhanced.

The answer further states, that pending the negotiation respecting the lease, and about the time of its execution, the defendant being entirely ignorant of the science of hydraulics, and of the mode of measurement of flowing water, and being unacquainted with the subject practically, having had no experience

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in relation thereto, applied to the engineer of the Trenton Delaware Falls company to ascertain the quantity of water necessary for the mill, who informed him that six horse power would be sufficient, in consequence of which he contracted for that quantity; but that he was then ignorant of the quantity of water constituting a horse power, and supposed the complainant, he being landlord of the mill, and a stockholder in, and president of the company, knew the true quantity of water called for by the terms of the lease. Admits that, after the execution of the lease, he repeatedly heard it stated that nine square inches under a three feet head at the site of the mill, constituted a horse power; but does not recollect that, before the making of the lease, he ever heard it stated by any one, what constituted a horse power at that particular site, or at any other; and he expressly denies, that at the execution of the lease, or at any time prior, fifty-four square inches, under a three feet head, was designated or understood between himself and the doctor to be six horse power; but that those terms were used in the lease in their appropriate and technical sense alone. That, by the plain terms of the lease, the complainant is bound to furnish six horse power of water, which requires seventy-four square inches under a three feet head.

Admits that the clause of guaranty in the lease was intent and intended as charged in the complainant's bill.

Admits that he entered into possession of the mill about the first of August, eighteen hundred and thirty-four, and continued therein, unmolested, until about the twenty-fourth of September, eighteen hundred and thirty-five, during all which time he received an ample supply of water; but about that time the complainant procured an aperture to be fitted on the breasting of the mill, sixty-five inches in length, and one inch and three-eighths of an inch in width, the area being eighty-nine and a quarter square inches; which was adjusted by the monument of the company, under a head, as defendant believes, of eleven inches and three-eighths of an inch. This aperture did not vent a quantity of water equivalent to a six horse power, according to the understanding of the parties and the true intent and meaning of the

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lease. By the setting of the aperture a further supply of water was cut off from the mill, and the aperture would not pass sufficient water to drive the mill so as to answer any useful purpose, and the mill was consequently stopped. The aperture was put in contrary to the will, and against the remonstrances of the defendant, and after it had remained in about five days, during which time it prevented the mill from working, defendant caused it to be removed, and the water to be let freely on the wheel, as before; but he denies that he has drawn a great or unnecessary quantity of water upon the wheel, or that it has been driven with such violence or irregularity as to injure the mill.

Alleges that since the mill has been in operation, it has been ascertained that the quantity of water contracted for in the lease, is not sufficient for the use of the mill, and that he has drawn on the wheel, since the same has been in operation, a quantity of water equal, as he believes, to six horse power and a sixth of a horse power, or two square inches under a three feet head more than was specified and contracted for in the lease, for which he offered to the complainant to pay, before the aperture was put in, in addition to the rent specified by the lease, the rent required by the Delaware Falls company for such additional quantity, and that he is ready still to pay the same.

Does not know whether the aperture was put in by the direction of the company or not, but presumes not, as no apertures have been placed on any of the other mills. The company, he alleges, have not objected to his using the water, nor has he used it to the damage of any of the other lessees, nor has the complainant been subjected to any forfeiture or damage by reason thereof.

The cause came on for hearing upon bill, answer, replication and proofs.

Hamilton and I. H. Williamson, for complainant.

H. W. Green and W. Halsted, for defendant.

THE CHANCELLOR. In this case the complainant, on the twenty-ninth of March, eighteen hundred and thirty-four, leased to the defendant a saw-mill in Trenton, for the term of four years and ten months, at a rent of four hundred and forty-six dollars, including the privilege of drawing from the canal of the water-power company, for the use of the mill, a quantity of water equal to "six horse power," without any description of what quantity of water, at that situation, was to be considered as "a horse power."

The bill charges, that the complainant had made a verbal agreement with William G. Cook, the brother of the defendant, for a lease of the same mill, by which it was agreed that he should pay by way of rent sixty dollars for the lot, ten per cent. upon the cost of the mill, and three dollars per square inch for the water, and that this lease was made with reference to that verbal agreement, and the rent adjusted accordingly. And the bill further charges that it was the universal understanding with the mill owners and with the water power company, that at this situation, with the head and fall of water which existed there, nine square inches of water were equal to a horse power, and that this lease was made with that understanding both on the part of the complainant and defendant.

In conformity with this understanding, the complainant, in adjusting the aperture to discharge the water on to the wheel of the mill, fixed it at fifty-four square inches, equal to a six horse power at nine inches per horse power. The defendant removed this aperture, and put another aperture equal to seventy-two square inches and claims a right to draw from that aperture; and to restrain him from drawing more water than would flow through an aperture of fifty-four square inches is the principal object of the bill. The defendant, in his answer, denies that the lease was made in conformity with the verbal agreement which had been made with his brother, or that in making the lease nine square inches were considered as a horse power, and alleges that he refused to execute any agreement until the rent could be fixed and made certain as to amount; that he was informed by

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the engineer that a six horse power would be sufficient to drive the mill, and that the terms were used in the lease in their technical sense; that he did not know what aperture would give a horse power, and that after the lease was executed he understood that an aperture of nine square inches would give a horse power.

From the evidence in the case, it is manifest that it was the general impression among those interested in the water power and mills and property upon it, that it would require an aperture of but nine square inches at this location to give one horse power, and it is equally manifest that this impression arose from a mistaken calculation of the engineer, and that in point of fact it required an aperture of twelve square inches at that location to give a horse power. It was not a mistake as to the extent of a horse power, according to its technical meaning, but the mistake arose in calculating the extent of an aperture which would yield that power.

If the complainant would limit the defendant to the measurement of an aperture of nine square inches for a horse power, it would be necessary for him to show, not only that such was the general impression, but he must show that the defendant agreed to this manner of measuring the horse power. It would not be sufficient to prove that even the defendant himself, at the time of the lease, was under the impression that an aperture of nine square inches would yield a horse power, for he might have had that impression and yet been unwilling to make a contract upon it.

What is the evidence as to this point? The bill alleges, that the lease was made with reference to this parol agreement with the brother, whereby the rent was adjusted at three dollars per square inch. The answer expressly denies this part of the bill, and upon this answer the defendant may rest, unless there is evidence to contradict the answer in this respect.

Upon examining the testimony I cannot find that this allegation of the answer is contradicted; on the contrary it appears to be confirmed by all the testimony which applies to this point.

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A lease was made out by Mr. Lott, which was in conformity with this verbal agreement of the brother, fixing the rent at sixty dollars for ground rent, ten per cent. on cost of mill, and three dollars per inch for the water. This lease the defendant refused to execute, because the amount of rent was uncertain. The lease now in dispute was then made out by Mr. Evans, which was executed, and at the time this lease was executed Mr. Evans says that "something was said about a lease having been drawn by Mr. Lott, but never had been executed. Mr. Cook said he did not like it."

This evidence is in confirmation of the defendant's answer, and shows that he would not make the contract until the amount of the rent was settled and fixed. From information derived from the engineer, he knew or believed that a six horse power was sufficient to drive the mill, and therefore was willing to contract for a six horse power, but was not willing that the rent should be uncertain, and therefore refused to sign the first lease, which was uncertain as to the amount of rent, both as respects the ten per cent. upon the cost and the three dollars per square inch of water that might be required to drive the mill.

In this stage of the negotiation I presume that the complainant undertook to establish in his own mind what rent he would charge, and in adjusting it he set down sixty dollars for ground rent, then ascertained the cost or probable cost of the buildings, and took ten per cent. of that cost for the next item, and then, being under the impression that nine square inches would give a horse power, and as the defendant wanted a six horse power, he made his calculation upon fifty-four square inches of water, and thus made up the amount of four hundred and forty-six dollars as the rent of the whole; and the defendant agreed to this amount, and the lease was accordingly executed. But it turns out that the complainant was mistaken in his impression that nine square inches would make a horse power at that place, and that it in fact requires twelve square inches to give that power. If under these circumstances it should be admitted by the defendant that he was under the impression at that time, that at

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aperture of nine square inches at that place would give a horse power, I can see no reason why he should suffer for the mistake. He would not take upon himself the risk of these impressions being correct. He undoubtedly intended to bargain for enough water to drive the mill, and satisfied himself that a horse power would do it, and there is no evidence that he agreed as to any particular manner of measuring the quantity of water that would yield that power.

In order to test the principle, let it be supposed that the mistake had been the other way, and that in fact six square inches at that place would have given a horse power, and the defendant had insisted that his rent should be received in that ratio, he would have been told that the water was offered to him by the inch, but that he would not take it so, and insisted upon having the rent fixed at a sum certain.

Again, supposing it had turned out that the complainant had made a mistake in estimating the cost of the mill, and instead of costing him two thousand two hundred and forty dollars (as alleged,) it had cost him three thousand two hundred and forty dollars, thereby making a difference in the rent of one hundred dollars (according to the views of the complainant,) could he with propriety have called upon the defendant to pay the added rent of one hundred dollars upon discovering this mistake? I apprehend not; in either case the mistake was made by the complainant and he must suffer the loss in consequence of that mistake.

I am therefore of opinion that the defendant, by virtue of his lease, is entitled to draw a quantity of water equal to a six horse power, and to use an aperture which will yield that power. As to the allegation that the mill is injured by the use of too much water, and thereby driving it too fast, if it was a case for the interference of this court there is no evidence of such continued or threatened irreparable injury as to authorize the exercise of its power. Let the bill be dismissed, with costs.

* Decree accordingly.

* An appeal having been taken by the complainant, this decree was unanimously affirmed, with costs, by the court of appeals, at a special term, in January, eighteen hundred and forty.

GEORGE HULME et al. v. JONATHAN L. SHREVE and
SAMUEL SHREVE.

The right to flow back water acquired by prescription, is as absolute as any other right.

A party who has acquired such right, is entitled to the use of the whole of the head of the stream as far back as he flows, in the manner he has been accustomed to use it; and if another seek to change the manner of use, he must show conclusively that the change will not be prejudicial to the occupant.

Will not the party having such right be protected against any change in the manner of his enjoyment, even if no actual injury can be proved to result from such change?—*Quere.*

The court will not, by injunction, restrain a defendant from the use and enjoyment of a work constructed with the express or implied assent of the complainant, though it prove prejudicial to his rights.

Nor will the court, under such circumstances, enjoin either the completion of the original work, or the construction of any new work necessarily connected with or forming a part of the original construction.

But when the defendants, with the complainants' assent, construct new waste gates in their mill pond, connected with a new channel or race-way to carry the water into the complainants' mill pond, at a point nearer to the complainants' mill than its natural and accustomed channel, and after a lapse of four years attempt to extend the race-way from the waste gates, and to cause the water to enter the mill pond still nearer to the complainants' mill, the court will restrain the execution of such new work by injunction.

And though such new improvement be commenced in the summer and carried on during the ensuing fall and winter, but not completed in February, when the complainants' bill was filed for an injunction, the complainants have not lost their remedy by laches.

If waste gates be constructed by the defendants, and used by them through a course of years, with the complainants' assent, the complainants cannot have relief by injunction so long as the use of the gates is confined to their original purpose; but if an attempt is made to apply them to a different purpose, injurious to the complainants, the court will by injunction entirely prohibit the use of the gates.

INJUNCTION bill, filed the thirteenth of February, eighteen hundred and thirty-seven. The material charges of the bill are set forth in the chancellor's opinion. Upon filing the bill, an injunction issued as prayed for, restraining the defendant

[*Halme et al. v. Shreve.*]

"from opening or completing the artificial channel or raceway, by them now making across Butterworth's neck, so that any of the water of the north or main channel of Rancocus creek shall flow into or through the same; and from further altering or diverting the said stream from its natural course, in any manner; and from erecting, making, or causing any dams, banks, or obstructions in the same; and from hoisting and raising, or keeping hoisted or raised their said new waste or flood gates, whereby any water from the mill pond of the defendants, shall be permitted to flow through the artificial channel or race-way by them made across Budd's neck, and thereby fill up the said creek with the earth out of said raceway."

On the second day of March, eighteen hundred and thirty-seven, the defendants filed their answer, and gave notice of an application to dissolve the injunction. Numerous depositions were taken by both parties upon notice, to be used upon the argument of the motion. The depositions were read without objection, and the cause being one of great moment, the chancellor, upon the request of both parties, made a personal examination of the premises, previous to the hearing.

W. Halsted and Southard, for defendants, in support of the motion.

H. W. Green and I. H. Williamson, contra.

Cases cited by defendants' counsel, in support of the motion.

1 *Cox's C.* 102; 18 *Vesey*, 514; 1 *Brown's C. C.* 588;
6 *John. Chan. R.* 19; 1 *Mylne and K.* 154; *Saxton*,
157.

Cases cited by complainants' counsel. 1 *Sim. and Stu.*

190; 5 *Halsted*, 78; 3 *Ibid*, 149; *Coxe*, 460; 6 *East*, 208;
2 *Conn.* 584; 2 *Barn. and Ald.* 662; 3 *Kent's Com.* 440;
Bac. Ab. Nuisance A.; *Noy*, 103; 3 *Keble*, 640, 759; *Jeremy's*
Eq. 310; 1 *Dickens*, 164; 19 *Vesey*, 122; 2 *Swans.* 331;
3 *Vern.* 390; 2 *John. Ch. R.* 165, 470; *Baldwin*, 232; 10

Wend. 175; *Prec. in. Chan.* 530; 2 *Cox's C.* 4; 2 *Wm.* 414.

THE CHANCELLOR. The complainants, in their bill, charge that they are seized in fee simple, as tenants in common, of certain lands, water power, mills, &c., situate at Mount Holly in the county of Burlington, in this state, on the waters of Rancocus creek; and that they hold and enjoy as appurtenant to that property, the right of holding back the water of the creek, by their dams, up the natural bed of the said creek, about four miles, to the mills of the defendants, formerly known as Parker's mills; and further, that they, and those under whom they hold, have held, used and enjoyed this property, and have flowed back the water in manner aforesaid, for more than a century, and that their right so to do, has never been converted.

That their dams and gates are so constructed that they draw down the head of water at their mills, about four feet, and continue to drive their works, consisting of a grist-mill, saw-mill, paper-mill, &c.

That the creek is very tortuous between the mills of complainants and defendants, being about four miles by the course of the stream, and one and three-fifths of a mile by the road; and by this winding course of the stream, the complainants have always derived great benefit, it forming for them a long and spacious pond, by which they were enabled to hold back a large supply of water for their mills.

That the mills and dams of the defendants have been erected long since the mills and dams of the complainants, and subject to their right of flowing back the water in manner aforesaid.

That the defendants purchased their mills in eighteen hundred and thirty-two, and at the time of their purchase, and until some time in the year eighteen hundred and thirty-five, the mill-dam gates of their mill were so situate, that their surplus water was discharged into the stream, immediately below their mills, and at the head of the pond of complainants.

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That the defendants, after purchasing, increased their establishment by erecting new factories, and finding that their waste water, when vented, sometimes created back water, in order to avoid that effect, in the summer or fall of eighteen hundred and thirty-five, they made an addition to their mill-pond, and formed new waste-gates, in such position that the water was discharged into the main stream or pond of the complainants, about two-fifths of a mile below the mills of the defendants, where the waste water had been before discharged.

That in the summer or fall of eighteen hundred and thirty-six, the defendants formed a dam across the main stream or pond of complainants, near the said new waste-gates, and cut a canal across the neck of land called Warner's meadow, by which the course of the stream or pond was changed from its natural course, and forced through that canal, and the water from the said new waste-gates, was turned into that part of the old bed of the stream which was cut off by said canal; and they then formed another dam across the pond, near the lower outlet of said canal, which prevented the water of said waste-gates, from flowing into the pond at that place; and in order to give vent to that waste water, they, the defendants, cut a canal across another neck of land, called Budd's neck, and forced the waste water through that canal about twenty-two chains, where it was again discharged into the original stream or bed of the pond of the complainants, at a place called Earle's neck; and that they had cut a canal across Earle's neck, by which the course of the stream or pond was diverted from its original course, and a part of the original bed of the pond cut off.

And further, that the defendants were about to erect dams across the original bed of the stream or pond, at each termination of the said last mentioned canal; and to open another cut across the neck below, called Butterworth's neck, so that the waste water from said new waste-gates, by means of these new cuts and dams, would be made to flow in a channel entirely separate from the main stream or pond, until it emptied into the same at the lower part of Butterworth's neck, near the mills of

the complainants, instead of being discharged into the said pond at the head of it, as it had from time immemorial been discharged.

They also charge that by this contrivance they are deprived of a part of their pond or reservoir, by means of the said dams cutting off a portion thereof; that other parts of their pond are and will be filled up by the sand and dirt washed out of those cuts; that the waste water flowing through this new cut having a greater fall than that flowing by the original bed of the pond, and being discharged in the pond near the dam, will escape more rapidly than if permitted to flow through its original course, and thereby deprive the complainants of the full benefit of their water; and farther, that by reason of the more rapid discharge of the water by means of this new cut, the works of the complainants will be more liable to be injured in times of high water; and they also charge that the defendants have made and are about making their said canals or cuts so small that they cannot pass the water that will be required, and the soil being loose and sandy will consequently be washed into the pond below, as it is carried out of the cuts by the current of water which will continue to excavate those cuts until they shall have capacity sufficient for the flow of all the water, and all the earth which is washed out of those cuts must be deposited in the pond below, by means whereof its capacity will be diminished, and the complainants thereby injured.

And the complainants also charge, that by these dams and cuts they are deprived of the power of backing the water up to the mills of the defendants, as they formerly could, and of right should be permitted to do; and that in a dry time they had no surplus of water, and by means of the said dams and cuts the capacity of their pond would be so diminished as to do them an irreparable injury, &c. And they pray that the defendant "may be restrained from any further diversion, alteration or damming up of said Rancocus creek, and from opening any channel, canal or race-way below their mill pond for the water of said creek to flow into, and from hoisting their said new waste

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gates or flood gates, and thereby washing earth and sand into the said creek."

An injunction was issued, according to the prayer of the bill. The defendants have answered, and affidavits been taken; and the question now presented is, whether the injunction shall be dissolved, modified, or continued.

The defendants, in their answer, admit almost all of the material allegations of the bill, but deny most of its conclusions. The principal allegation of the bill which is not admitted by the answer, refers to the right of the complainants to flow back the water of the Rancocus to the dam of the defendants. The complainants claim this right, and allege that they and those under whom they hold, have enjoyed and used this right from time immemorial. The defendants, in their answer, admit that the complainants have held and enjoyed the right of backing the water up the stream some distance; but they are ignorant whether they possess and enjoy the right of backing the water up the stream to their mills. And if the complainants possess any such right, the defendants deny that they have ever used, exercised, or enjoyed that right, and they allege that in the year eighteen hundred and thirty-one, when they purchased their mills, the complainants' mill-dams did not back the water to their mills, nor do they at this time. If the answer had stopped here it would have been a full answer and denial of the allegation of the complainants' bill in that particular. But the defendants proceed in their answer, and say that "the back-water of the defendants' mill is created by the narrowness of the creek, and the quantity of water flowing down the same, and not by the complainants' dam; for in the fall of the year eighteen hundred and thirty-one, there was a fall in the said stream from the lower point of the neck of land called Warner's meadow, up to the defendants' mills, of from six to eight inches." Here they admit that they have back-water, but they charge it to the narrowness of the stream, and not to the dam of the complainants; and their allegation that the back-water is not occasioned by the dam of the complainants, is evidently a conclusion drawn

from the fact, that there are six or eight inches fall between their mills and the lower point of the neck of land called Warner's meadow. This conclusion is evidently erroneous, for by inspecting the measurements of the depths of the stream or pond, it will be found that from the mills of the defendants down to Warner's meadow, the average depth is about four feet three inches, and that depth increases gradually from that point down to the dams of the complainants, where the average depth is more than six feet; so that there is a gradual fall in the stream from the one mill to the other, and it cannot be doubted that if the complainants' dam were removed entirely, the water would sink at the lower part of Warner's meadow, probably to one half its present depth, and thereby the water from above would escape more readily, and of course relieve the wheels of the defendants in some measure from their back-water. But the witnesses who have testified upon this subject all agree that there is, and always has been, back-water at the mills of the defendants; and the engineer puts the matter beyond controversy, for he says that he has levelled the stream, and finds the complainants' full head about eight inches higher than the sheeting of the wheels of the defendants' mills, and whenever the parties shall make the experiment, by stopping both mills and letting the water find its level in the pond of the complainants, they will find that the water will stand on the sheeting of the defendants' mills nearly a foot deep.

A very common error prevails as to the flowing back of the water by means of dams or other obstructions in the stream. The complainants have fallen into that error when they allege that they cannot now flow back the water further than Earle's cut, because they observe a current through that cut more rapid than the other parts of the stream. And the defendants have fallen into the same error when they allege that the complainants never flowed back to their mill, because there is a fall of six or eight inches in the stream above Warner's meadow.

The intervention of a ripple or rapid current, in a stream or pond, is no evidence that the water above that ripple or current

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is not affected by the dam or obstruction below. And in this pond of the complainants, if its width were diminished one half for any distance, the water would flow through that part of the pond, while the mills were in operation, with double the velocity that it would flow through the other parts, and thereby create a current or ripple, and yet the dam below would operate upon the water above that ripple; for it may readily be perceived, that if the dam or obstruction were removed from below, the water would of course sink, and thereby increase the rapidity of the current through the narrow part of the stream, and thereby permit the water above to escape more rapidly. I make these remarks to explain the difficulty under which the parties and witnesses appear to have labored—being entirely satisfied, not only from the testimony of the witnesses, but from the answer of the defendants themselves, that the dam of the complainants flows the water back to the mills of the defendants. Some question was made upon the argument of the cause, as to the time that the complainants and those under whom they hold, have used, occupied and enjoyed this privilege of flowing back the water in the manner it is now used; but it is evident, from the whole testimony, that the works of the complainants have existed from time immemorial—that the works of the defendants were erected in the year seventeen hundred and eighty; since that time, no complaint has been made, that the complainants have raised their head; and in fact, the evidence shows the contrary as far as a negative can be proved; and I am of opinion that the complainants have a right to flow back the water to the mills of the defendants, in the manner that their dams, as at present constructed, will flow it back, and this right is as absolute as any other right which the complainants can have, and for its violation the law gives them an ample remedy.

The next question for consideration, is, whether the defendants have violated this right, and if so, whether the complainants have sought the proper remedy. And as to the remedy, it is objected on the part of the defendants, that even if the complainants had a remedy by injunction, they have lost it by stand-

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ing by and permitting the defendants to go on expending money in these improvements, without objection. As to this point, the facts are, that the defendants made their new waste-gates in eighteen hundred and thirty-two, and put them up in eighteen hundred and thirty-three; this was done by the knowledge and partly under the advice of one of the complainants. By this work the waste water was discharged into the main stream about two-fifths of a mile below the mills of defendants, where it had theretofore been discharged. No objection was made to this change by the complainants.

In the summer and fall of eighteen hundred and thirty-six, the defendants proceeded to make the dams across the stream at Warner's meadow, and the cut across Budd's neck, and were proceeding to make the cut across Butterworth's neck, when the injunction was served upon them, in February, eighteen hundred and thirty-seven.

If there were any necessary connection between the formation of the waste-gates in eighteen hundred and thirty-three, and the subsequent formation of the cuts and dams in eighteen hundred and thirty-six, I should consider that the complainants had lost their remedy by their laches; but I see no necessary connection between the two works, either from their nature, or from the evidence in the cause. It is true, that the latter operation of forming the dams and cuts, may probably have been suggested by the fact that the operation of the waste-gate had been beneficial to the defendants; but the formation of these waste-gates was a work in itself perfect, and could not have been considered as giving notice to any one, that the plan was to be extended, by those dams and cuts; and there is no evidence that at the time they themselves had any further view than merely the formation and use of the waste-gates.

Considering it, then, as a work commenced in the summer of eighteen hundred and thirty-six, and carried on during that fall and winter, and not completed in February, when the complainants adopted the remedy, I can find no case in the books that would warrant me in declaring that the complainants had lost

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their remedy; and if such a case could be found, I should not be disposed to follow it.

The defendants also object to that part of the injunction which prohibits the use of the waste-gates, contending that it amounts to a destruction of that work, which was put up by the consent of the complainants themselves. The objection is not well taken. If they had confined the use of the gates to their original purpose, then the complainants could not have complained; but when they attempt to divert them to a different purpose, which is injurious to the complainants, then the reason of the objection fails. And in this case, if the defendants had carried their cuts so as to discharge the waste water into the stream below the mills of the complainants, it would hardly be contended that the party would be deprived of his remedy, merely because the gates had originally been erected by the consent of the complainants, for the purpose of discharging the waste water in the stream near them; and yet, in such case, the court could not give the remedy, except by injoining the defendants from hoisting those gates so that the water should pass by the complainants' mills.

The only remaining inquiry, is, whether the complainants have made a case requiring the interposition of this court, by its restraining power. The answer admits all the facts charged in the bill, as to the making the dams and cuts, and their intention to finish their plan, so that the waste water should be discharged into the pond of the complainants, below Butterworth's neck; but deny that this work will prejudice the complainants; on the contrary, they allege that it will be a decided benefit to them, and upon this subject there appears some contrariety of opinion among the witnesses.

It may here be remarked, that the complainants are entitled to the use of the whole of the bed of this stream, as far back as they flow, in the manner they have been accustomed to use it, and it behooves any one who would change that manner of use, to show most conclusively, that the change could not injure them. I do not, however, intend to express an opinion that the

{*Hulme et al. v. Shreve.*}

complainants could be compelled to submit to such change, even if no injury could be proved to result therefrom. But in this case, I think it most manifest, that the complainants will suffer serious and irreparable injury, by the completion and continuance of these cuts and dams, according to the plan proposed. I make this conclusion as well from the direct evidence upon the point, as from the nature and consequence of the work itself.

It is evident, in the first place, that by the canals across Warner's meadow and Earle's neck, and the dams thrown across the stream at the extremities of those cuts, the complainants will be deprived of so much of their pond or reservoir, as the portions of the pond cut off exceed the canals which are substituted.

In the next place, it will tend to fill up the pond with the sand and dirt washed out of the cuts, and form bars across the pond, which may seriously affect the complainants in the use of the water of their pond; and in this respect, serious injury is to be apprehended, particularly from the cut across Butterworth's neck. It will be remarked, that that cut enters into the pond at its lower extremity, nearly at right angles; as it is partly dug, and proposed to be finished, its capacity is not sufficient for the flow of water which must pass through it, without creating a very rapid current, and the ground at that place being sandy and gravelly, it will necessarily form a bar across the main stream or pond, as the water of this cut will flow across the pond, and thereby check the stream of the pond, (being more sluggish,) and form an eddy immediately below the current from the cut, where the sand and dirt will be deposited. These consequences I consider as certain, and certainly injurious to the complainants.

As to the effect of discharging the waste water of defendant into the pond of the complainants, near their dam, instead of discharging it at the head of their pond, there appears to be a contrariety of opinion in the minds of the witnesses; and if that power were used with an eye to the interest of the complainants I cannot perceive that any serious injury can be apprehended.

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from it, nor can I imagine that it would be of any service to the complainants. But one result is certain, it would give to the defendants a greater control of the water than they now have, and enable them, if disposed to injure the complainants, to use it much more effectually for the purpose; as it now is, they have to discharge their waste water through these flood-gates only, and that at the head of the pond, and of course the water has to pass through and fill up the tortuous channel of the pond for four miles, before it reaches the dam of complainants; but if these new cuts and dams are made, the defendants have an additional and much more rapid discharge for their waste waters, and by throwing it rapidly into the pond below, it must necessarily escape over the dam of the complainants, and may thus escape without filling up the pond, as it must have done, if admitted at the head.

Upon the whole evidence, I am satisfied that the projected plan of the defendants, if permitted to be carried into execution, would do the complainants a serious and irreparable injury, and therefore, cannot consent either to dissolve or modify the injunction.

*Order accordingly.

* From this decision of the chancellor an appeal was taken by the defendants, and the decision affirmed, with costs, by the court of appeals, at November term, eighteen hundred and forty-one—eleven of the members voting for affirmance, and three for reversal.

***ABRAHAM VARICK, Surviving Executor of RICHARD VARICK
deceased, v. DANIEL CRANE and Wife.**

If a bond and mortgage, given by a resident of New-Jersey to a person temporarily residing there, but having his permanent residence and his place of business in New-York, be made and executed in New-Jersey, but delivered to the obligee at his place of business in the city of New-York, and the money there paid, the place of the contract is in New-York, and interest is to be computed according to the laws of that state, although the obligee be described in the bond as *now* of the state of New-Jersey.

Nor will the construction be affected by the circumstance that the bond and mortgage were given to secure the purchase money of land in New-Jersey. Where a party's residence is in one state, and his place of business in another, the presumption is that his contracts are made rather at his place of business than at his place of residence.

In the absence of any direct evidence of the place in which the contract was made, the money advanced, or the papers delivered, the presumption obtains that the contract was made at the place where the person lives who is to receive the money, or where the contract is to be performed; and this presumption is not overcome by the fact that the obligee lived in another state, and that the bond and mortgage were made and executed, and the mortgage recorded there.

If a contract is susceptible of two constructions, that should be adopted which will render it operative, rather than that which will render it void.

The taking of usurious interest upon a bond, will not vitiate a valid instrument, but if taken by the obligee it furnishes prima facie evidence that the original agreement was corrupt.

To constitute usury there must be a corrupt agreement to receive more than the law allows by way of interest.

The second section of the act against usury, by which it is enacted, that all mortgages made for the payment of money lent, on which a higher interest is received or taken than is allowed by the said act, shall be utterly void, applies only to securities given contrary to the provisions of the first section of the act, and does not avoid a mortgage made and executed in this state to secure the payment of a bond upon which a higher rate of interest is reserved, if the bond is valid by the law of the place of the contract.

BILL for the foreclosure of a mortgage given by a citizen of New-Jersey, upon lands in said state, to a citizen of New-York

* The opinion in this cause was delivered at April term, eighteen hundred and thirty-eight, after the expiration of chancellor Dickerson's term of office.

[Varick's Ex'r v. Crane.]

The answer sets up usury as a defence. The facts relied upon to sustain the defence are fully stated in the opinion of the master. The chancellor having been of counsel for one of the parties, the cause was heard upon the pleadings and proofs, before PHILEMON DICKERSON, esquire, one of the masters of the court, who was called to advise with the chancellor upon the hearing.

Frelinghuysen, for complainant.

A. S. Pennington, for defendants.

THE MASTER. In this case the bill of complaint was filed by John V. Varick and Abraham Varick, executors of Richard Varick, deceased, to foreclose a mortgage given by the defendants to Richard Varick in his life time. Since the commencement of the suit, John V. Varick has died, and the suit is now carried on by the survivor.

The mortgage is in the common form, dated on the tenth of June, eighteen hundred and thirty-one, and was given to secure the payment of a bond of the same date, given by the defendant, Daniel Crane, to Richard Varick, in the penal sum of six thousand dollars, conditioned to pay three thousand dollars on or before the first of November then next, with lawful interest.

The defendant, in his answer, sets up usury by way of defence, and the question arising upon that defence is the only one which is now submitted for consideration. The answer alleges, and it is admitted, that the consideration for which the three thousand dollar bond was given, was the amount of two other bonds, which Richard Varick held against the defendant, one for one thousand nine hundred dollars, and the other for four hundred dollars, with the interest on said bonds, calculated at seven per cent., and the balance in cash; and it is insisted by the defendant that the said two bonds were six per cent. bonds, and that the three thousand dollar bond is tainted with usury, because seven per cent. interest was charged upon those two

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bonds in order to make up the consideration of the last bond and if it be true that either of those two bonds drew but six per cent. interest, the three thousand dollar bond is usurious and void.

It is therefore manifest, that the decision of the case rests upon the character of those two bonds; in order to ascertain which it is necessary to examine them separately, as they were given at different times, and the evidence as to the two is in some respects different.

It is not at this time necessary to cite authorities to prove that contracts, as to their construction, are generally governed by the *lex loci contractus*. But when they are to be enforced, the *lex fori* prevails. There are, however, some principles of law or rules of evidence, whereby to ascertain the place of the contract, which require examination in the investigation of the case. For, according to my view, its decision depends upon the place in which the contract was made, or in which, from the circumstances of the case, the law presumes it was made.

It is manifest that the parties, at the time of the loan, considered this one thousand nine hundred dollar bond as a New York bond, and that it would yield seven per cent. It appears by the testimony of Mr. Woolsey, that Mr. Varick agreed to make the loan at the New-York rate of interest; and when the three thousand dollar bond was given, the interest on that other bond was calculated at seven per cent. without objection on the part of the defendant.

But the important inquiry yet remains, whether that bond was in fact and in law a seven per cent. bond. The general principles which govern this case, appear to be well settled, and the difficulty grows out of the uncertainty as to facts, rather than the principles of law and equity applicable to those facts. As the place where the original contract for the loan of the one thousand nine hundred dollar bond was made, there is no direct evidence, and we must therefore be governed by the presumptions fairly to be drawn from the facts of the case.

On the part of the complainants it appears, that Richard V

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rick, with whom the contract was made, was a citizen of the state of New-York, and had his permanent residence in the city of New-York, except during the hot months of the summer, when with his family he resided at Jersey City. His office was in the city of New-York, in which he transacted his business at all times, including the time of his temporary residence at Jersey City. This bond and mortgage were delivered in the city of New-York, and the money paid and receipts given there.

On the part of the defendants, it appears that he resided at Jersey City, where the land described in the mortgage lies. The papers were made out at his request, and executed by him at Jersey City, and the mortgage recorded there. The obligee, Richard Varick, at the date of the bond had his temporary residence at Jersey City, and in the bond he is described as being "now" of Jersey City.

Under these circumstances, what is the fair presumption as to the place of contract?

The fact that the papers were made out and executed at Jersey City, at the request of the defendant, might have some weight, if there were no other evidence upon the subject; but in this case the existence of other facts, affording stronger presumption, renders this fact altogether immaterial.

That the land is situate in New-Jersey, and of course the mortgage recorded there, I consider as unimportant in this case, although in the absence of all other evidence upon the subject, that fact might have been the foundation for a fair presumption that such was the place of the contract.

The next fact, that the bond describes the obligee as being at the time of Jersey City, is merely corroborative of the direct evidence upon the subject, that he did at that time in fact live there; and the word "now" appears to have been introduced as explanatory of the temporary nature of his residence. But all presumption as to the residence of the parties, arising from these circumstances, must yield to the direct evidence upon the subject.

We then have this case in point of fact. Richard Varick, the obligee, was a citizen of the state of New-York, and residing

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permanently in the city of New-York. During the summer months he resided in Jersey City, but still kept his office in the city of New-York, where he transacted his business.

On the fourth of August, eighteen hundred and thirty, when he had his temporary residence at Jersey City, he loaned the money in the city of New-York, and there received the bond and mortgage for the same, which mortgage is upon land in Jersey City. The bond reserves lawful interest, without specifying the rate. The interest of the state of New-York is seven per cent. and of New-Jersey is six per cent., and the question is whether the contract for this loan shall be presumed to have been made in New-York or in New-Jersey. If this is not to be considered a New-York contract, it must be because the obligor at the date of the contract, had a temporary residence in New-Jersey, at the same time that he kept his office and transacted his business in the city of New-York.

Upon general principles, if a man reside in one state and transacts his business in another, it would be presumed that his contracts were made at his place of business, rather than his place of residence, and in this case that presumption is confirmed by the fact that the papers were actually exchanged and the money paid at his place of business.

If a resident of New-Jersey receive goods of a New-York merchant, in the city of New-York, where his store is kept, the presumption of law would be, that the contract for those goods was made in New-York, although the New-York merchant, at the time, had his temporary residence in New-Jersey. And so of a broker or money lender, who has his office permanently in New-York, and a resident of New-Jersey receives money of him by way of loan, at his office in New-York, it would be considered a New-York contract, although the broker, at the time, resided in New-Jersey. And the correctness of this view may be illustrated by reversing the case and placing the merchant or broker in New-Jersey, where the interest is but six per cent., and the customer in New-York; in that case, if the merchant resides permanently in the state of New-Jersey, and keeps a store in Jersey City, where he sells goods to a resident of New-York, and

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takes a note for the amount of those goods, upon suit brought in our courts upon that note, it would be considered a New-Jersey contract, and the plaintiff could not change its character, by showing that he resided with his family during the winter months in the city of New-York, and that this particular sale of goods took place during such residence.

For these reasons, I am of opinion that the circumstances of the case warrant the presumption that the contract, as to the one thousand nine hundred dollar bond, was made in the city of New-York, and consequently that it was subject to the laws of New-York.

As to the character of the four hundred dollar bond, I think there can be no doubt. At the date of that bond the obligee was a citizen and resident of New-York, and transacted his business there, and in the bond itself he is described as being of the city of New-York; and in the absence of any direct evidence of the place in which the contract was made, or the money advanced, or papers delivered, the presumption of the law is that the contract was made at the place where the person lives who is to receive the money, or where the contract is to be performed, 2 Paige, 604; and that presumption is not overcome by the facts in this case, that the obligor lived in Jersey City, and that he had the bond and mortgage made out there, and of course, the mortgage recorded there.

I am of opinion, therefore, that the four hundred dollar bond was also a New-York bond, and of course that the interest was properly charged at seven per cent. upon these bonds, when they were taken up by the three thousand dollar bond. And if I had serious doubts upon the subject, I should arrive at the same conclusion, upon the principles of law laid down by the court, in the case of *Archibald v. Thomas*, 3 Cowen, 284; that if a contract is susceptible of two constructions, that one should be accepted which would render it operative, rather than the one which would render it void.

But it also appears in evidence, that the complainant, who is the executor of Richard Varick, deceased, actually received of the

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defendant, interest at the rate of seven per cent. upon this three thousand dollar bond, which is admitted to be a six per cent. bond. And it was insisted, that although the taking of usurious interest does not vitiate a valid contract, yet it furnishes *prima facie* evidence that the original agreement was corrupt. This doctrine is without doubt correct, but it does not appear to apply to the case, for from the very statement of the principle, it appears to be but *prima facie* evidence, and of course that the party is at liberty to rebut by other evidence, the presumption arising from that fact; and in this case such other evidence has been offered. Besides, the force of the presumption in this case is broken by the fact that the money was received, not by the person who made the contract, but by his executor.

In order to constitute usury, there must be a corrupt agreement to receive more than the law allows, by way of interest. If the contract in terms reserves more than the law allows, it is presumed to be corrupt and is usurious, but that presumption may be repelled, by shewing that it arose from mistake; so if the contract reserves lawful interest, without stating the rate, and the party receives more than the law allows, it is *prima facie* evidence that the original agreement was corrupt, because the person who made the contract, is presumed to know what interest was reserved; but the presumption ceases when the money is received by an executor, who, from the nature of his office, could not be presumed to know any thing about the original contract except that which he obtained from an inspection of the paper themselves.

When we take into consideration the situation of this executor, settling an estate of a New-York testator, and that estate composed principally of New-York contracts, and when we find the defendant paying this seven per cent. without objection or remark, and apparently with a design thereby to lay the foundation of the plea of usury, it appears to me that it would be a violation of all rules, to presume from that fact, that the testator in taking this bond, stipulated for the payment of seven per cent. or that the transaction was usurious.

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Another point was raised upon the argument, although not much urged: that a mortgage which is made and executed in New-Jersey, to secure the payment of any bond, upon which more than six per cent. is reserved, is void by the operation of the second section of our act against usury.

That section declares, "that all notes, mortgages, &c. which shall be made for the payment of money, &c. on which a higher interest is reserved or taken, than is hereby allowed, shall be utterly void." *Rev. Laws*, 269.

According to the strict literal construction of this section, it might embrace this case; but it is a sound rule "that such construction should be put upon a statute as may best answer the intention which the maker had in view." 6 *Bacon*, 385.

By the first section of this act the rate of interest was established, and the obvious intention of the second section was to render void any security given contrary to the provisions of the first section.

But it certainly could not have been the intention of the legislature, to render void a mortgage which should be given to secure the payment of a valid bond, and of course, if the bond in this case be a valid bond, the mortgage cannot be subject to the operation of that section.

Upon the argument, some reliance was placed upon the fact that this bond was given in part for the purchase of land in New-Jersey; but it is well settled that this circumstance makes no difference: 1 *John. Cases*, 365; 1 *Vesey, sen.* 428; 3 *Atk.* 727.

Upon the whole case, I am satisfied that this bond is not tainted with usury, and therefore, respectfully advise the chancellor that the complainant is entitled to recover.

Decree accordingly.

MARY ANN CLARK V. THOMAS HAINES.

The limitation of time within which an appeal is to be taken from the determination of the orphans' court, to the prerogative court, under the twenty-first section of the act, entitled, "An act to ascertain the power and authority of the ordinary and his surrogates," &c. (*Rev. Laws*, 776,) refers not to the filing of the petition of appeal in the prerogative court, but to the demanding and filing the appeal in the orphans' court.

The party appellant, upon making his appeal in the court below, should procure all the necessary transcripts from that court, and file them, together with his petition of appeal, in the prerogative court, at the term next after the demand of the appeal in the court below.*

The appellant, in the prerogative court, is not required to deposit one hundred dollars to answer the costs of the appeal, according to the practice of the court of appeals.

APPEAL from a decree of the orphans' court of the county of Burlington, admitting to probate a paper writing purporting to be the last will and testament of Franklin B. C. Budd, deceased. Rule to show cause why the appeal should not be dismissed. The grounds relied upon in support of the rule, are stated in the opinion of the ordinary.

H. W. Green, for respondent, in support of the rule.

Wall, for appellant, contra.

THE ORDINARY. The questions in this case arise upon an appeal made from the orphans' court of the county of Burlington. The decree in the court below, was entered on the twenty-second of January, eighteen hundred and thirty-four. On the tenth of April, in the same year, the appellant filed her petition of appeal in this court in the usual form, and on the same day

* However salutary this direction may be, it is not complied with. The papers are seldom returned and filed at the next term after the appeal demanded. The practice is, upon filing the petition of appeal, to take a rule upon the surrogate, requiring him to return the papers.

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obtained a rule upon the respondent to answer in forty days. At the succeeding July term, the appellant was ordered by a rule of this court to shew cause why her appeal should not be dismissed out of this court.

And in support of this rule, it is alleged on the part of the respondent, that the appeal should be dismissed for two causes; in the first place, because the appeal was not made within the thirty days prescribed by the act; and second, because the appellant had not made the deposit required.

As to the first point, it is admitted that the appellant demanded and filed her appeal before the orphans' court at the time of pronouncing the decree appealed from, but did not file her petition of appeal until the next regular term of this court.

The appeal was made under the twenty-first section of the act entitled "an act to ascertain the power and authority of the ordinary and his surrogates," &c.; which authorizes an appeal to this court, "if demanded by any of the parties within thirty days after the sentence or decree of the orphans' court;" and the question is, whether this appeal was made in time, according to the true construction of that act. If the limitation as to time refers to the filing of the petition of appeal in this court, then the appeal should be dismissed, as it was not filed within the thirty days. But if it refers to the demand and filing the appeal in the orphans' court, then the appeal is properly before this court.

An appeal is correctly defined to be "the removal of a cause from one tribunal to a higher;" but this definition gives but little aid in solving the present question, for that appeal cannot be affected without the action of both of the tribunals; they must both be addressed, or appealed to; the one to send up the proceedings, and the other to receive them, and take jurisdiction of the cause. This definition does not ascertain to which of these appeals the limitation as to time refers.

Nor can we have much aid from examining the practice in England in analogous cases. It is indeed said that an appeal to the house of lords is to be signed by the counsel, and exhibited by way of petition, but that petition can be presented only

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during the fourteen first days of the session of parliament, unless the appeal be made from a decree which is pronounced whilst parliament is actually sitting.

In the state of New-York, in cases of appeal from the court of chancery to the court of errors, the practice is to file the appeal with the register or assistant register of the court of chancery, within the time prescribed by law; and this proceeding is considered as the appeal, and so treated and called in all the further proceedings in the cause; and upon filing this appeal with the register or assistant register, he is bound, without further order, to send the necessary papers up to the appellate court, at the session of which court the appellant presents his petition of appeal, when the transcripts and proceedings of the court below are brought in and filed with the clerk of the appellate court. And although the appellate court are not fully possessed of jurisdiction of the cause until the petition of appeal is presented to them, yet if the appellant neglects to file his petition of appeal after having filed his appeal in the court below, the appellate court will make an order on him that he present his petition within a limited time, or that it be not received: *Bradwell v. Weeks*, 1 *John. Chan. R.* 326. It is therefore evident, that for certain purposes, the appellate court are possessed of jurisdiction of the cause by virtue of the appeal to the court below, even before filing the petition of appeal.

The course of practice in our court of appeals, in cases of appeal from the court of chancery, is similar to that of New-York. By the sixty-second, sixty-third and sixty-fourth rules of the court of chancery, any person who wishes to appeal, is required to file his appeal with the clerk in chancery, and that proceeding is considered as the appeal. The petition of appeal is not to be filed until the next term of the court of appeals, and on the first or second day thereof; and in default of so doing, such appeal shall be considered as waived, and proceedings may thereon be had as if no appeal had been filed in the court below.

So far, therefore, as the practice of the court of appeals in the state of New-York or in this state can have any influence

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upon this court, in establishing its practice, it leads to the conclusion that the limitation in our statute refers to the time of making and filing the appeal in the court below, and not to the time of filing the petition of appeal in this court. And if we refer to the practice in New-York, in case of appeal to the court of chancery from the sentence or decree of the surrogate, or from the decision of a circuit judge on appeal from a surrogate, we shall arrive at the same conclusion.

I find, however, that the practice in this court has been otherwise. In the case of **Mecray v. Richardson*, one of my predecessors dismissed the appeal, because the petition of appeal had not been filed in this court within the thirty days; and in the case of †*Delany v. Noble, Adm'r of Maher*, my immediate predecessor dismissed the appeal for the same cause. From the great respect due to these opinions, and from a desire to maintain uniformity of practice, I was disposed to adopt the same course; and I probably should have so done if I had considered it within the power of this court to establish either course of practice at pleasure. But it is a matter which is regulated by statute, and I feel bound to establish the practice according to my views of the true construction of that statute.

Let us, then, examine the statute giving an appeal in this case. By the twenty-first section of the act, the sentence or decree of the orphans' court shall be "subject to an appeal to the prerogative court, if demanded by any of the parties within thirty days after the sentence or decree of the orphans' court; after which, if no appeal be demanded, the surrogate shall proceed thereon as the sentence of the orphans' court shall direct." And in the forty-third section of the same act, the surrogate is allowed a fee for "entering and filing appeals."

It may be true that an appeal, in its most extensive signification, may include the petition to the appellate court, and may not be considered as perfected until that petition is filed; but when the nature and form of the demand of appeal filed with the court below, and of the petition of appeal filed with the

* Decided by Seely, ordinary, at July term, 1832.

† See ante, vol. ii. page 559.

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appellate court, is considered, I cannot think that any reasonable doubt can exist of the intention of the legislature in using the terms "if demanded by any of the parties within thirty days." They would not have used the term "demanded," they had referred to the petition of appeal. The term is appropriate. Besides, the petition of appeal, in form, is no demand, nor even a petition that an appeal should be granted. The usual form of the prayer of that petition is, that the sentence or decree of the court below should be reversed, assuming that the appeal is already made. But the appeal filed with the court below, is in its very terms, a demand of appeal. I am therefore of opinion that the limitation of thirty days, expressed in the act, refers to the time of demanding the appeal of the court below, and in cases of this kind, the party appellant upon making his appeal below, should procure all the necessary transcripts from that court, and file them in this court at the same time that he files his petition of appeal, which should be the next term of this court after the appeal demanded below.

As to the other reason assigned, that the appellant had deposited one hundred dollars, to answer costs, according to the practice in the court of appeals, I do not think it well founded. The court of appeals have ordered that the appellant shall deposit with the clerk in chancery, upon an appeal from a decree of that court, one hundred dollars, to answer the costs of appeal if the appellants shall not prosecute the same to effect.

And it is competent for this court to establish a similar rule, but I cannot give that construction to the vague expression contained in the first rule of this court, "That the order proceeding on the hearing of an appeal from an orphan's estate to the ordinary, shall be the same as on appeals from the court of chancery to the court of errors and appeals." The right of appeal is guaranteed by the statute, and I cannot establish a practice which derogates so much from that right by a liberal construction of a rule so doubtful in its terms. It is a right which cannot be taken away by a rule of this court, nor is it embarrassed by implication.

The rule to show cause must be discharged.

CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF THE STATE OF NEW-JERSEY.
JANUARY TERM, 1842.

WILLIAM PENNINGTON, ESQ., CHANCELLOR.

[Chancellor Pennington was appointed in October, 1837. The opinions delivered by him between the close of chancellor DICKINSON's term and the present time, viz. from January term, 1838, to October term, 1841, inclusive, are reported ante, volume first.]

ALBERT VANHOUTEN v. JOHN McCARTY and others.

If the purchaser of real estate gives to the vendor a mortgage for part of the purchase money, and then sells the equity of redemption in the mortgaged premises; upon a bill filed to foreclose the equity of redemption against the present owner, a court of equity will not enforce the specific performance of an agreement made by the mortgagee with an intermediate owner, nor permit the defendant to set off the damages sustained by the present owner by reason of the breach of such agreement, against the amount due on the mortgage.

The time specified for the payment of a bond may be enlarged by parol.

THE bill in this cause, filed on the twenty-ninth day of December, eighteen hundred and thirty-eight, is for the foreclo-

[Vanbouten v. McCarty et al.]

sure of a mortgage, given by John McCarty and wife to the complainant, bearing date on the twenty-seventh day of April, eighteen hundred and thirty-six, to secure the payment of a bond of even date, given by the said McCarty to the complainant, conditioned for the payment of ten thousand eight hundred and twenty-two dollars and fifty cents, as follows: one thousand dollars on the twenty-ninth day of September then next; two thousand dollars on the first day of May, eighteen hundred and thirty-seven, and the residue on the first day of May, eighteen and thirty-eight, with lawful interest for the same, from the first day of May next after the date of the said bond, payable semi-annually, on the first days of November and May, in each year, until the whole principal is paid.

The bill states, that interest had been paid unto the first day of April, eighteen hundred and thirty-eight, but that the whole of the principal, with interest from that date, remains due.

The bill further states, that John McCarty and wife, the mortgagors, by deed dated the twenty-seventh day of April, eighteen hundred and thirty-six, conveyed the mortgaged premises unto John Kirk, George Johnston and John Copland; that Kirk, Johnston and Copland, by deed dated the twenty-fourth day of September, eighteen hundred and thirty-six, conveyed to Edward N. Rogers and John A. Stimler; that Rogers and Stimler, by deed dated the ninth day of December, eighteen hundred and thirty-six, conveyed to Archibald G. Rogers, upon certain trusts.

That as complainant has been informed and believes, the said Edward N. Rogers and John A. Stimler have an interest in said premises, as *cestui que trusts*; and that the said Archibald G. Rogers and Edward N. Rogers, by deed dated the seventh day of February, eighteen hundred and thirty-eight, conveyed all their right, title and interest in the mortgaged premises to Nehemiah Rogers.

The bill further states, that the possession of the said mortgaged premises have never been required or demanded from the complainant by the said McCarty, or by either of the subsequent

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grantee; and that it was agreed between the complainant and McCarty, that complainant should retain possession, without being liable for any rent, until the principal sum secured by the mortgage should be paid.

That by virtue of said agreement, complainant has continued in possession of the mortgaged premises, and has given time to McCarty and his assigns for the payment of the principal, beyond the period mentioned in the condition of the bond, and that interest has been paid to complainant, up to the first day of April last, without any demand made of him for rent by way of setoff or otherwise.

A decree *pro confesso* was taken against all the defendants, except Archibald G. Rogers and Nehemiah Rogers, by whom separate answers were filed.

The answers admit the bond and mortgage, but set up by way of defence several matters, which, so far as is material to an understanding of the case, are specified in the opinion of the chancellor.

The cause having been put at issue, depositions were taken, and the cause came on for hearing upon the pleadings and proofs.

E. B. D. Ogden, for complainants.

Archibald G. Rogers and *A. S. Pennington*, for defendants.

Cases cited by complainants' counsel. 3 *T. R.* 393; 1 *H. Black*, 562; 1 *Ves. and B.* 524; 1 *John. Chan.* 343; 1 *Brown's C. R.* 92; *Saxton*, 393, 328; 3 *Cond. Eng. Chan. R.* 318; 5 *Cowen*, 497; 2 *Brown's P. C.* 134, 136; 1 *John. Chan.* 213; 3 *Mer.* 247; *Atkinson on Titles*, 45, 50; *Saxton*, 17, 282; *Rev. Laws*, 151, sec. 10; *Comyn on Con.* 67.

Cases cited on the part of the defendants. 3 *Marshall*, 419; 2 *Root*, 37; 3 *Hals.* 293; 19 *John.* 294; 14 *John.* 435; 2 *Sch.*

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and *Lef.* 214, 661; 1 *Ibid.* 165, 182; *Kelley on Usury*, 111; 11 *John.* 538; 18 *John.* 110; 19 *John.* 325; 1 *Hals.* 471; 5 *Cowen*, 202; 1 *John.* 691; 3 *John.* 528; 2 *Wend.* 587; 1 *Green*, 165; 1 *John. Cas.* 23; *Chitty on Con.* 27; 14 *John.* 330; 13 *Vesey*, 456; 3 *Cowen*, 445; 2 *Dess.* 582; *Cro. Eliz.* 20; 3 *Vesey*, 38, *note*; 9 *Vesey*, 249; 6 *Vesey*, 537; 13 *Vesey*, 456; 1 *Comyn on Con.* 80; 1 *Brown's C. R.* 269; 2 *Burr.* 978; 12 *John.* 451; 2 *Ball and B.* 348; 1 *Cox*, 258; 1 *Swans.* 172; 9 *Vesey*, 608; 3 *Cowen*, 445; 1 *Cowen*, 713; 1 *Binney*, 218; 1 *Rand.* 165; 14 *John.* 15.

THE CHANCELLOR. In eighteen hundred and thirty-six, during the rage for speculation in real estate, the complainant sold his farm, in the neighborhood of Paterson, to the defendant, John McCarty, for thirteen thousand dollars; the conveyance was made on the twenty-seventh of April, eighteen hundred and thirty-six, and to secure so much of the consideration money, the defendant executed to the complainant a bond and mortgage, in the same day, for ten thousand eight hundred and twenty-two dollars and fifty cents, on the premises, payable in the following manner: one thousand dollars on the twenty-ninth of September, then next; two thousand dollars on the first of May, eighteen hundred and thirty-seven, and the residue on the first of May, eighteen hundred and thirty-eight, with interest from the first of May next after the date of the bond, payable on the first days of November and May in each year.

On the same day that McCarty got his deed, he conveyed the property to Kirk, Johnston and Copland, and they under an agreement made by McCarty with Edward N. Rogers and John A. Stimler, for a large advance, conveyed the property to them, by deed dated the twenty-fourth of September, eighteen hundred and thirty-six.

Since the last deed, Edward N. Rogers and John A. Stimler have conveyed to Archibald G. Rogers, who has also conveyed to Nehemiah Rogers, in whom the equity of redemption now resides.

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The bill is filed for the foreclosure and sale of these premises, under the mortgage made by McCarty to the complainant.

A decree *pro confesso* was taken against McCarty and wife, Edward N. Rogers and Stimler.

Archibald Rogers and Nehemiah Rogers have filed separate answers, upon which the cause has been put at issue, and decisions taken.

The first ground of defence set up, is that the transaction is usurious, and the bond and mortgage therefore void. It is not contended that the first contract, made by the complainant with McCarty, was thus tainted, but Eugene McCarty, a son of John McCarty, is brought as a witness, who testifies that in the spring eighteen hundred and thirty-six, between the time of executing the agreement by his father with the complainant, and the time of consummating it by giving the deed and taking the bond and mortgage, he went with his father to the complainant's, about dark, and his father went in and called the complainant out, and told him he could do nothing with the property, unless he would give him five years to pay the money; and complainant agreed to do so, provided he was paid two or three thousand dollars before the bond was given, if he could maintain on the land free of rent, during the period the payment was to run. The witness says he stood outside the yard, close to the fence; that complainant and his father came up to him while the conversation on this subject was going on between them, and after hearing this, he stepped aside, leaving them still in conversation. The usury consists in the agreement, by which the complainant, for enlarging the time of payment, stipulated not only for his regular interest, but in addition for the possession of the premises.

Without entering into the question, how far, under the peculiar circumstances of this case, the complainant's remaining in possession free of rent, would make the transaction usurious, it appears to me dangerous ground, to defeat an agreement already reduced to writing, under the hands and seals of the parties, by a loose conversation as this. The witness does not appear to

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have heard either the commencement or the close of it, and cannot, therefore, be relied on for the whole story. But it is a sufficient answer to this evidence, that if it be all true as stated, that these parties did, at the time referred to, agree to this arrangement, certain it is that it was no part of the original agreement, entered into in writing, on the twenty-fifth of February, eighteen hundred and thirty-six, for the sale of the farm; nor was it carried out at the time the deed was given and the bond and mortgage executed, on the twenty-seventh of April, eighteen hundred and thirty-six. The papers are executed according to the terms of the written agreement; the terms for payment are not fixed at five years, but in the manner called for by the original contract; nor is there any stipulation whatever made for the possession; the original agreement is the one carried into effect between the parties, and not the one referred to by the witness. I am, therefore, clearly of opinion, that the evidence fails to establish a case of usury, and that it can constitute no defence against this bond and mortgage.

The next point taken, arises from the object the purchasers had in buying this property. They intended to set it off in building lots, and Edward N. Rogers, who had agreed in his purchase with McCarty, for five years for the payment of the money, after getting his deed, learned for the first time, from the complainant, that the bond and mortgage were payable at an earlier day; he expressed his surprise, and told the complainant that he should look to McCarty and those concerned with him, to make good their agreement; when the complainant told the witness that he did not believe there would be any difficulty, as his great object was to get his interest; that the witness thereupon told complainant he would think over the subject and make him a proposition. The witness then says, that the same afternoon he called on the complainant, and told him he would make this agreement with him—that if he would extend the time of payment of the bond five years from the twenty-seventh of April ensuing its date, making six years in all, and release the lots that deponent and Stimler should sell, from the

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of the mortgage, (provided such release did not exceed one fourth of the property,) on his being paid for the property thus released, or having the bonds and mortgages given for their chase money assigned to him, that complainant might retain the possession of the residue of the farm free of rent, and that no claim would be made for rent for the time he had already occupied it. This proposition, he says, was agreed to by the complainant.

The evidence then proceeds to show that the complainant is guilty of a breach of this agreement; and it is insisted by the defendant, Nehemiah Rogers, is entitled, before the complainant can have his decree in this cause, to a specific performance of the complainant's agreement to release lots as they should be sold on the premises, or to have his damages for such breach of his agreement, set off against the amount of the bond and mortgage.

This is taking a wide range, and involving in a case of foreclosure of a mortgage, a great variety of matters and endless litigation. If this defence should be sustained, I see no limit to a bill of foreclosure, to settling before decree every agreement and controversy respecting the land between the complainant and all the intermediate owners down to and including the present, and that too, whether the mortgage has any connection with them or not. This agreement is not made with the mortgagor, but with Edward N. Rogers, an intermediate owner, and declared to have been entered into long after the mortgage was made, and for purposes connected with the property, growing out of the manner in which sales were proposed to be made. The defendant must, in my opinion, be left on this agreement, to his remedy at law. The complainant is able to refund in damages, as it is stated, for any amount in which he may be fully chargeable, and there is no safe mode in this court, of trying questions of this character; it is properly a case for a jury to assess the damages, and not for investigation before this court. The evidence would lead me to believe that the complainant has not regarded, as he should have done, the position

of men who had purchased property at so expensive a rate, and who had no way of remunerating themselves but by selling off lots; still, I do not see how the defendant can avail himself of such a defence in this action. Can this court decree a specific performance against the complainant of his agreement, in this action? There is no precedent for such a course of practice, and to attempt to settle the damages incident to a breach of such an agreement, would be equally against the course of procedure. I am, therefore, of opinion, that this defence cannot avail the defendant in this action.

The last objection is, that the time of payment for the principal was extended by the complainant, for five years from the twenty-seventh of April, eighteen hundred and thirty-seven, and the bond and mortgage will of course not be due until the twenty-seventh of April, eighteen hundred and forty-two. This is clearly established, from the evidence, and the defendant is entitled to this time, before payment can be demanded. Edward N. Rogers expressly so swears, and the whole evidence, as well as the statement in the complainant's bill, go to show such an understanding. It is well settled, that the time for payment may be extended by parol: *Chitty on Contracts*, 27, in note; 1 *John. Cases*, 23; 3 *John.* 528; 2 *Wendell*, 587; 14 *John.* 330; 1 *Green*, 165; *Saxton*, 280.

There must, therefore, be a reference to a master, to ascertain and report the amount due the complainant for interest on the bond and mortgage, after deducting a fair compensation for the use and occupation of the farm; and also, whether a part of the premises can be sold without material injury to the rest. The justice of this case, as far as I am able to reach it in this suit, as it appears to me, is, to consider the time of payment for the principal of the bond enlarged to the twenty-seventh of April next, leaving the interest payable half yearly. The contract made for complainant's enjoying the possession free of rent, is part of the one for releasing a portion of the lands, subsequently made with Mr. Rogers, and must be settled with that.

Decree accordingly, and reference to a master.

ANDREW H. HOPPER v. STEPHEN LUTKINS.

the purchaser of a mill-seat and water-power accepts from the vendor a deed, without any covenant for his protection, as to the height of the dam, or the extent of the flow to which he is entitled, and the purchaser is subjected to damages by reason of the improper height of the dam, he is without remedy either at law or in equity.

it was designed by the parties that a deed should contain covenants, and they have by mistake been omitted by the scrivener, the mistake will be corrected by a court of equity, and the deed reformed accordingly.

the deed contain full covenants of warranty as to the height of the dam, and the covenants are broken, a court of equity will not enjoin the vendor from proceeding at law to recover the purchase money, nor set off the damages sustained by the vendee by the breach of such covenants against the claim of the vendor for the purchase money, but will leave the parties to their remedies at law.

there is no mode in which the damages sustained by the breach of such covenants can be satisfactorily ascertained in a court of equity.

a court of equity can interfere to set off the damages sustained by the vendee by breach of the covenants in his deed, against the claim of the vendor for the purchase money, only where the covenants are such that the damages resulting from the breach can be ascertained according to the practice of the court.

BILL for injunction and relief, filed September tenth, fifteen hundred and forty. The bill charges, that in the month of March, eighteen hundred and thirty-five, the defendant, representing himself to be seized in fee of certain lands and premises particularly described in the deed thereafter set forth, of the dam in the said deed mentioned, and of the right to keep the said dam at the height it then was, and to overflow the lands which were overflowed by the waters above said dam, and the mill kept at the height it then was, bargained and agreed with the complainant to convey to him in fee simple, by a good deed of bargain and sale, the said land and premises, and the mills thereon, and the dam and the mill-pond thereto belonging, and the water privilege with the right of overflowing the lands above said dam as far as the waters of the Saddle river (on which the said dam was erected) would overflow the same, at the height

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the said dam then was, for the sum of seven thousand dollars, to be paid by the complainant,—and that the defendant agreed to convey said lands and premises, with said appurtenances, to the complainant, as aforesaid, by deed containing the usual covenants against incumbrances, and of warranty, seizin and right to convey. That in pursuance of the said agreement, and as the performance of the same, the said defendant and his wife, on or about the nineteenth day of March, eighteen hundred and thirty-seven, made and executed to the complainant a deed, which is set forth in the bill, and is in the usual form.

The bill further charges, that a great part of the value of the said property, consists in the mills, and the water power thereto belonging, and that the said mills and water rights was one of the principal inducements for the complainant's purchasing the farm at the large price he paid therefor, and that the complainant would not have purchased at that price, unless it had been agreed that the defendant should convey and warrant unto the complainant, the said water power and privilege at the height of the dam, as it stood at the time of the said conveyance, and that the said deed was drawn by the conveyancer who drew the same without specifying the height of the dam and the extent of water privilege thereby conveyed, through inadvertence and mistake; he, the conveyancer, supposing that the terms of said deed were sufficient to convey and warrant unto the complainant said water power and dam at the height at which the dam stood at the time of said conveyance; and that the deed was accepted by the complainant under the like mistake and misapprehension; and that at the time of the said conveyance, it was the intention of both the parties thereto, that the said dam and water power should be conveyed and warranted to the complainant, at the height at which the said dam then stood.

The bill further charges, that soon after the said conveyance and on or about the eighteenth of April, eighteen hundred and thirty-five, the defendant executed to the complainant a bond to indemnify the complainant against a suit then begun, b

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one Stephen Berdan, against the complainant, on account of the said dam, at the height, at which it was at the time of the said conveyance, causing the water to overflow the lands of said Berdan, and in the said bond the defendant recited that he had by the aforesaid deed, conveyed to the complainant the said lands and mills, and also the said dam at the height it then was. That the said Berdan, before the said sale and conveyance to the complainant, had commenced an action in the Bergen pleas against the said Stephen Lutkins, for damages for overflowing lands of said Berdan, by reason of the said dam being at a greater height than the said defendant had any right to keep or maintain it; and that the said Berdan, at September term, eighteen hundred and thirty-five, recovered judgment in the said suit against the defendant. That Berdan still threatens further suits against the complainant for damages by reason of the said dam still being at an unlawful height, and to compel him to reduce it.

That at the term of March, eighteen hundred and forty, one John R. Post, who since the said conveyance to the complainant has become the owner of adjoining lands, commenced an action against the complainant, for damages, for overflowing his lands, by the said dam being kept at an unlawful height, although at the time of the alleged grievance, the dam was no higher than it was at the date of the said conveyance.

The bill further charges, that at the time of the said purchase by the complainant, he gave to the defendant his note for one thousand two hundred and fifty dollars as part payment for the farm; that one thousand dollars of the principal of the said note still remains due and unpaid, and that the defendant has commenced an action at law against the complainant for the recovering thereof; that the defendant is a man of small means, and speedily becoming impoverished, and that if permitted to recover the amount unpaid on said note, the complainant will be unable to collect from him the amount of damages that may be recovered by reason of the breach of the covenants contained in said deed; and that unless the complainant can retain the

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same out of the amount due on said note, the complainant will be without adequate remedy in that behalf.

The prayer of the bill is, that the defendant may be compelled by the order and decree of the court to amend said deed, so as expressly to convey to the complainant in fee simple, the water privilege therein mentioned, at the height of the dam as it was at the date of the said conveyance, and that it may be ascertained under the direction of the court, whether the defendant had a right to convey to the complainant, at the date of said deed, the water privilege and power, at the height at which said dam then was, and at what height the defendant had right and power to convey said dam and water privilege, and what deduction ought to be made from the price agreed to be paid by the complainant for said lands, mills, and water privileges, on account of the want of right in the defendant to convey said water right at the height at which the said dam then was, and that in the mean time the defendant may be restrained from proceeding with his action at law for the recovering of the said note.

Upon filing the bill, an injunction was issued, as prayed for.

The defendant, by his answer, denies that he represented himself to be seized in fee simple of the right to keep the said dam at the height it then was, or to overflow the lands which were overflowed while the dam was kept at that height; denies that it was the intention of the parties to said deed, that the said dam and water power should be warranted to the complainant at the height it then was; denies that he bargained and agreed with the complainant to convey to him in fee simple, the said water privilege, and the right of overflowing lands as far as the said dam would overflow the same at the height it then was, or that he ever agreed to warrant the right of continuing the dam at that height; denies that such warranty was ever required by the complainant, or that defendant ever intended to give it; denies that there was any misapprehension on the part of defendant in executing said conveyance, or any mistake in drawing the same; admits the execution of the deed,

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und insists that it was drawn and executed pursuant to agreement between the parties; denies all mistake or misapprehension on the part of the conveyancer who drew the deed, and insists that it was drawn pursuant to his instruction; denies his inability to satisfy the complainant for any damages to be recovered for a breach of covenants.

The cause was heard on motion to dissolve the injunction, upon bill and answer.

Wright and I. H. Williamson, in support of the motion.

A. O. Zabriskie, contra.

THE CHANCELLOR. I am well satisfied the injunction in this case should be dissolved. The only equity in the bill, is the charge of mistake in drawing the covenants of the deed, and that is explicitly and fully denied, by the answer. The other grounds upon which relief is sought, cannot, from the view I take of the case, be sustained. The facts as they appear from the pleadings are, that the complainant, in eighteen hundred and thirty five, purchased a farm in Bergen county of the defendant, with a mill seat and water privileges. The deed contains the usual covenants of seizin, of warrantee, and against incumbrances. The complainant insists, that he purchased with the understanding that the dam stood at its proper height, and that the covenants were intended in express terms to secure to him that right. At the time of the conveyance, a suit was pending in the common pleas of Bergen, by Stephen Berdan against the defendant, for overflowing his lands by reason of the dam being higher than it should be, and in which action there was a recovery subsequently had, in favor of the plaintiff. The dam was at the same height when the injury complained of in this suit took place, as when the sale was made by the defendant to the complainant. Berdan having succeeded in his action, now threatens a further prosecution against the complainant for not reducing his dam to the height, as settled by the

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verdict in his suit against the defendant. The bill also charges, that John R. Post, another owner adjoining this mill seat, has commenced a suit in the circuit court of Bergen against the complainant, for overflowing his lands by the height of the same dam, and that such suit is still pending, undetermined. The dam has remained at the same height as when complainant purchased. In part payment for this farm, the complainant gave the defendant his promissory note, now past due, for twelve hundred and fifty dollars. There is remaining unpaid on that note one thousand dollars, besides interest. To recover this money, the defendant commenced an action at law against the complainant, and he was enjoined from further proceeding thereon, until the alleged mistake in the deed could be corrected and he should fulfil his covenants and agreements with the complainant, or until further order.

This bill, then, has two objects; to reform the deed made by the defendant, and to enjoin him from proceeding to collect the note of twelve hundred and fifty dollars.

Upon the first ground, the complainant will be at liberty, if he thinks proper, to proceed and take the proofs in this case; but as the defendant denies that any mistake was made, we are to see what propriety exists in the remaining part of the case for continuing the injunction.

I deem it no part of my province, on this motion, to settle how far the covenants actually go; whether they have any reference to the height of the dam or not. That will be determined when the question shall arise before the proper tribunal.

If the complainant has taken a deed without any covenants for his protection, in the flow of this water, then he is without remedy for his damages, either at law or in this court. If, however, it was designed by the parties that the deed should contain covenants, and they have by mistake been omitted by the scrivener in drawing it, that mistake will be corrected and the deed reformed accordingly.

But suppose the deed to contain full covenants, as contended for by the complainant, (and that is giving him the advantage

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sole case,) what relief can this court afford him against the payment of his note? The object is, undoubtedly, to set off the complainant's damages, sustained under the covenants in his deed, against the note which he gave as part of the purchase money for the property. Can this be done?

It must be remembered, the complainant has sustained damages. A suit is instituted against him, and another is pending, but no recovery has been had. There is no mortgage, which the party is seeking the aid of the court for a foreclosure and sale of the premises, but a note on which the defendant is pursuing his legal remedy to recover his money. If the action against the collection of this note is continued, is it to be continued? Only until the suit now pending against the complainant, by John R. Post, is determined. This would not ascertain the amount of the complainant's damages; for Post may repeat his action, and it seems that he and perhaps others intend to bring suits also against him. To give the relief sought, it must continue until all the damages which the complainant can be put to, (and which the defendants are designed to protect him against,) are ascertained. This would be a very uncertain period, and proves that a rule of this kind would be productive of great inconvenience.

Whether these suits will ever be brought, or if brought, how often, is all beyond the power of this court to know, and the position of the parties is beyond its power to control.

Can this court, from the very course of its proceedings, in any satisfactory manner, the damages sustained by the defendant for this water? Even at law it is often difficult to come to a decision. I have been furnished with no case that goes the way desired.

The complainant's counsel has referred me to the case of *and others v. Gere*, 2 *John. Chan. R.* 546; but that means like the present. There the title to a part of the land sold was defective, and an ejectment was commenced for recovery of the possession. The chancellor enjoined the suit on the bond for the purchase money, and also proceedings

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on the mortgage, until the ejectment should be determined. This is widely different from settling damages arising from the overflow of lands. If a mortgagor is deprived by a trial at law of the half or other share of the land which he purchased, a computation may be made by a master of the value of that share, and it can be deduced from the amount of the mortgage; but how he would ascertain and adjust all the damages which this complainant may sustain by maintaining the dam in question at its present height, is more than I am able to discover. It would be impracticable, in my view of the case, to do so with any certainty. It is true that the same principle pervades both cases, that of preventing circuitry of actions, and allowing a setoff of damages under covenants against the purchase money. The difference is, that in the one case it is practicable to do so, and in the other it is not.

In the recent case in this court of **Coster v. Monroe Manufacturing Co.*, I went upon the force of authority so far, after a judgment had been obtained in ejectment against the mortgagor for a part of the premises, for which he gave the mortgage, and after a re-purchase made by him of that part from the plaintiff in ejectment, to refuse a decree for sale on the mortgage, until the damages the defendant had sustained under his covenants, were ascertained by a master and credited on the mortgage. I still think that view of the case correct and attainable, but I do not see how it can be pressed further, so as to reach every possible case of damages arising under covenants.

In *Bumpus v. Platner*, 1 *John. Chan. R.* 217, and *Abbott v. Allen*, 2 *John. Chan. R.* 521, the doctrine goes no further, than that a court of equity will relieve a purchaser against the payment of the purchase money, upon a failure of consideration, after an eviction at law.

It would be a sufficient answer to the complainant in this case, to say, that he has sustained no damages, no recovery having been obtained against him. But even if one judgment had been obtained against him, it would not settle the damages on the

* Ante, vol. i. page 467.

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covenant, for the same party might repeat his action, or other landholders commence other suits; and I therefore see no proper or correct course in a case like the present, but to leave the complainant to his remedy at law on his covenants, and to allow the defendant to proceed with his suit without the interference of this court.

Injunction dissolved.

THE NEW-BARBADOES TOLL BRIDGE COMPANY V. EDO
VREELAND.

The specific performance of a contract will be decreed against a subsequent purchaser of the bargained premises having knowledge of the complainant's equitable title.

If the contract is several, it is no ground of objection that the contract made by the complainant with divers defendants, be described in the bill of complaint as a contract between the complainant and defendant, without reference to the other parties.

More lapse of time constitutes in itself no bar to a decree for specific performance.

If the delay, under the circumstances, amounts to an abandonment of the contract, relief will be denied.

Under an agreement made by a landholder with a turnpike company to grant land for the use of the road, upon condition that the road is located on a particular route, a covenant to grant so much land as the road should occupy, and to execute a good and sufficient deed for the same, will be construed to mean a deed in fee simple, and not merely for the term of the company's charter.

Specific performance of a contract for the conveyance of land decreed after the lapse of twenty-three years, the vendee having been in possession.

BILL for the specific performance of a covenant made by Enoch G. Vreeland, the father of the defendant, with the complainants, to grant and convey to them so much of his homestead farm as their road should occupy, upon condition that the said road should be located upon a certain route. The agreement bears

[*New-Barbadoes Toll Bridge Co. v. Vreeland.*]

date on the twenty-first day of July, eighteen hundred and sixteen. The bill of complaint was filed on the seventh day of October, eighteen hundred and thirty-nine. Soon after the date of the agreement, the complainants entered upon the land and constructed their road upon the route specified in the agreement. On the twenty-first day of March, eighteen hundred and twenty-three, Enoch G. Vreeland conveyed his said homestead farm, by way of advancement, to his son Edo Vreeland, the defendant without any valuable consideration being paid therefor. At the time of the conveyance, the defendant had knowledge of the contract made by his father with the turnpike company. Hearing upon bill, answer, replication and proofs.

A. O. Zabriskie, for complainant, cited, *Wadsworth v. Wendell*, 5 *John. Chan.* 231; *Champion v. Brown*, 6 *Ibid* 398, 403; *Waters v. Travis*, 9 *John.* 450; *King v. Morford*, *Saxton*, 278; *Brashier v. Gratz*, 6 *Wheaton*, 528; *Radcliffe v. Warrington*, 12 *Vesey*, 326; *Stockley v. Stockley*, 1 *Vesey and B.* 23; *Alley v. Deschamps*, 13 *Vesey*, 225.

E. B. D. Ogden, for defendant, cited, *Savage v. Carroll*, 2 *Ball and B.* 451; *Legh v. Waverfield*, 5 *Vesey*, 452; *Savage v. Brocksopp*, 18 *Vesey*, 335; *Cudman v. Horner*, 18 *Vesey* 10; *Clermont v. Tusburgh*, 1 *Jac. and W.* 112; *Beaumont v. Dukes*, 4 *Con. Eng. Chan.* 195; *Powel v. Lloyd*, 2 *G and J.* 272; *Moore v. Blake*, 1 *Ball and B.* 69.

THE CHANCELLOR. By an act passed the sixteenth of February, eighteen hundred and sixteen, "The New-Barbadoes Toll Bridge Company," the complainants in this cause, was incorporated for the purpose of constructing a road from the east end of the Acquacknock bridge, in the county of Bergen, to the Hackensack and Hoboken turnpike-road, and to build bridges across Berry's creek and the Hackensack river. Three persons were appointed commissioners to lay out the road, and before they determined on the route, as is very common, the owners of

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property in the neighborhood through which it was to run, evinced a solicitude that it should pass over their lands. This state of things created the question between the upper and lower route. Pending the action of the commissioners, those interested in the upper route, the place where the road was finally located, obtained an agreement from a number of the land owners, agreeing to give their lands for the road. This agreement bears date the twenty-first of July, eighteen hundred and sixteen, and is signed and sealed by twenty persons. By this agreement, the persons executing it, covenant and agree severally with the president and directors of the New-Barbadoes Toll Bridge Company, that if the commissioners named in the aforesaid act, lay out the said road in a certain direction and manner, which is particularly stated, that they will respectively grant to them whatever portion of their respective lands the road shall occupy, and will execute good and sufficient deeds for the same. The route named in this agreement was adopted, and the road built accordingly. One of the persons who signed this agreement, was Enoch G. Vreeland, the father of the present defendant, who then owned a farm on the contemplated line of the road. This farm was conveyed by the father, subsequently, to his son, who is the defendant, as an advancement, and the present bill is filed against the son for a specific performance of the contract, so entered into by his father.

There is no doubt, as well from the answer of the defendant himself, as from the whole evidence, that he received the conveyance from his father, with full knowledge of this agreement; in fact, the subscribing witness thinks he was present when it was signed. It would seem that the old man was not favorable himself to the road, and objected to signing the paper, but the son, who it was then supposed would succeed to the farm, was favorable to it.

The defendant, therefore, can stand in no better situation than his father, for it is well settled, that a specific performance of a contract will be decreed against a subsequent purchaser,

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having knowledge of the complainant's equitable title : 5 *Jol Chan. R.* 231.

Upon the case, as it thus presents itself, it would seem that the defendant should perform this contract, and especially so, it is of a character requiring the land for the purposes of the road and damages at law might be a very inadequate relief, and there be very substantial reasons urged against it. A court of equity will look at the necessity that exists on the part of the complainants to have the possession of the land itself, in coming to a conclusion in the case. Here it is most manifest that the enjoyment of the land is indispensable, and without it the whole road may be defeated.

The first objection raised by the defendant, is, that the agreement as proved, is not the same as the one set out in the bill. The bill sets out an agreement between Enoch G. Vreeland and the complainants, whereas the one produced appears to have been made between the complainants and some twenty landholders. I do not think this a valid objection, for it is a several contract on the part of the different landholders with the company, and is so especially stated to be, although for greater convenience it is all put into one writing. They severally bind themselves to convey their respective lands, and there is no necessary dependence on each other.

The second objection deserves more consideration. It is the lapse of time since the agreement was entered into, before the defendant was called upon for his deed. The agreement was signed in July, eighteen hundred and sixteen, and the deed, would seem from the evidence, was not demanded until July eighteen hundred and thirty-nine, a period of twenty-three years. Mere lapse of time, is not held from the examination of the case to constitute a bar to relief, but may be explained. The court will look to it that no experiment is practised on the part of the complainant, however, as by waiting to see whether it is to his advantage to have the agreement carried into effect or not, before he seeks relief, and if the delay under the circumstances amounts to an abandonment of the contract, relief will be denied : 1 *T*

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sey and Beam, 23 ; 12 *Vesey*, 326 ; 13 *Vesey*, 225 ; 9 *John. R.* 450 ; 1 *Saxton*, 279.

In the present case, the road was laid out and the land taken possession of by the company, at or about the time the contract was entered into, the fences were changed and the complainants have ever since occupied and enjoyed the land. There has been no change in the circumstances of the parties, and no intention to abandon on the part of the complainants can be presumed, but a mere neglect to call for a deed, from a belief that it was sufficient to rest upon the contract. None of the parties to the agreement have ever conveyed, and the present suit, it is alleged, has grown out of one at law, in which the defendant pleaded title to the land over which the road is laid. It is, indeed, stated by the defendant, that the alleged trespass for which a suit was instituted against him at law, and in which he pleaded title, was for taking gravel on his own land, adjoining to, but no part of the road. This may all be true in point of fact, and yet the trespass complained of, as set out in the demand, was upon the turnpike road. With this explanation, and with the belief that many public roads have been constructed upon the faith of agreements alone, without considering it necessary to procure a deed for the lands, I am not willing to deny the relief now sought on this ground.

A third objection made, is, that good faith was not practised by the company in constructing this road. The road was to be four rods wide, and as each of the landholders gave two rods, they believed, and particularly Mr. Vreeland, that the bed of the road would have been in the centre, whereas, adjoining his land, it has been worked on his side, and so as to injure the fences. There can be no doubt Mr. Vreeland so thought, and that he has declared he never would have signed the agreement had he supposed otherwise. The sixth section of the charter requires that the road should be built in the centre. The witnesses explain this part of the case, by showing that the state of the ground was such as to call for making the road as they did. The company was poor and had to consult economy as much as possible, and

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they made it as they did, to avoid increased expense. This removes the idea of any designed oppression or wrong towards Mr Vreeland, though they were still bound to have met the expense and abided by the terms of the law. The agreement, however, does not place the consideration for the grant of the land upon the mode in which the road should be constructed, but distinctly upon the ground that the commissioners lay out the road by a certain route. As the party agreed to give his land for the road, and must, therefore, lose all further advantage from it, it does not strike me as any sufficient reason for not doing so, that in the construction of it they should have gone a little nearer his side than was contemplated, and especially if it became necessary, as a matter of convenience, to do so.

The deed tendered to the defendant is objected to. It appears to have been an ordinary conveyance, without covenants, of the land covered by the road, and is within the terms of the agreement. The agreement was, to grant the lands and to execute good and sufficient deeds for the same. The parties could have contemplated nothing short of a conveyance in fee, and not merely for the time the charter had to run.

The foundation of this suit, it is alleged, is to be traced to some personal difficulties between the defendant and a stockholder and manager of this company; and it is denied that any authority was ever given by the board of directors, to institute it. It would be quite impossible for me to enter into the motive which prompted this proceeding; I can only settle the rights of the parties as they are presented. The treasurer swears that there was a vote of the board of directors, requiring the land to be procured for the lands under the agreement, and this was instituted under the belief that a single action was sufficient to test the right.

I am of opinion, that no sufficient reason is assigned against the decree asked for in this case, and that the complainants are entitled to a specific performance of this contract from the defendant. This decree must, however, be without costs: while the complainants should have the land for the purposes of their

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will think, in view of all the circumstances in the case, and especially the lapse of time before they demanded it, they should not have costs.

JOHN COLLINS v. The EXECUTORS of ROBERT TAYLOR,
deceased, et al.

Where a bill has been filed by one of several legatees, for his share of a legacy, against the executors and the other legatees, and an interlocutory decree has been made establishing the right of the legatees to recover—the complainant cannot, after such decree, dismiss his bill to the prejudice of the legatees who are defendants, without their consent; and if such order of dismissal be made, it will be vacated and set aside, except so far as respects the complainant; and the interlocutory decree, and the master's report thereon, will be deemed valid and effectual so far as respects the other legatees.

Order of dismissal, as it respects parties prejudiced thereby, vacated after the lapse of three years from the date of the order.

Where the facts are all before the court, application to vacate a decree or set aside an order may be made upon motion merely. It is not necessary to file a petition.

BILL filed the twenty-ninth of September, eighteen hundred and twenty-six, for a legacy bequeathed by Robert Taylor, late of the county of Hunterdon, deceased, in and by a codicil to his last will and testament, bearing date on the thirtieth day of August, eighteen hundred and twenty-one. The bequest is as follows:

"I do hereby also revoke, disannul and make void, the bequest of one thousand dollars in my last will and testament made to Robert Huey, son of my niece, Martha Huey, of the county of Londonderry, in the kingdom of Ireland; and I do hereby give and bequeath to the said son of my niece, Martha Huey, now known by the name of Robert Taylor, the sum of one thousand dollars; and further, I do give and bequeath to the said Robert Taylor, the sum of nine thousand dollars, in

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trust, nevertheless, to be divided by him among the nearest descendants of my deceased sisters, in such proportions and to such persons as he in his judgment may think the most needy, prudent and meritorious, placing the most perfect reliance on his integrity, in the discharge of the trusts herein reposed in him, although only known to me by his good name, which I hope he will continue to deserve. If these two last bequests are not called for in seven years after my decease, my will is that they become void, and become part of the residue of my estate but if demanded, they are to be paid by my executors out of the residue of my estate mentioned in my last will and testament."

The testator died on the first of October, eighteen hundred and twenty-one, leaving his will and codicil unrevoked. Robert Huey, the legatee, died in the lifetime of the testator, unmarried and without issue. The testator had five sisters, viz. Elizabeth, Jane, Mary, Margaret and Ann, all of whom married and died in the lifetime of the testator, leaving issue.

At the time of filing the bill, the only surviving representatives of the said sisters, known to the complainant, were Edward Collins, the complainant, son of Margaret; Mary Moore and Elizabeth Moore, daughters of Elizabeth; Martha Moody daughter of Jane; and John Forsyth, Ann Forsyth and Elizabeth Forsyth, children of Ann; all of whom are made parties defendants with the executors, to the bill of complaint.

The prayer of the bill is, that the will of the testator may be established, and the trusts thereof performed and carried in execution under the direction of the court; and that the executors may be decreed to pay to the complainant the one-fifth of the said legacy of nine thousand dollars, or so much thereof as he appears to be entitled to, with interest.

An answer having been filed by the executors, the cause was put at issue and depositions taken.

By an interlocutory decree, made by chancellor Williamson at the January term, eighteen hundred and twenty-nine, it was decreed that the legacy so given in trust, did not lapse by the

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death of the legatee, in the lifetime of the testator ; and that the trusts ought to be performed and carried into execution ; and that the nearest descendants of the said deceased sisters of the testator, are entitled to have and receive from the executors the said legacy of nine thousand dollars, with interest ; and it was in and by said decree, referred to Charles Ewing, esq. one of the masters of the court, to ascertain and report who were, at the date of the said decree, the nearest descendants of the said sisters, and the proportions of the said legacy to which they were respectively entitled.

On the second of April, eighteen hundred and twenty-nine, the master made his report in pursuance of the said decretal order. On the ninth of April, eighteen hundred and twenty-nine, the report of the master was filed ; and on the same day, an appearance was filed for the other defendants, the *cestui que trusts* of the said legacy.

At the January term, eighteen hundred and thirty-one, an order was made, reciting that the matters in controversy between the complainant and the defendants, the executors of Robert Taylor, deceased, had been accommodated, and directing, with the assent of the solicitor of said defendants, that the complainant's bill be dismissed without costs.

Notice was subsequently given to the executors, of a motion to vacate and discharge the said order of dismissal, because the same was unlawful, and irregularly entered, and because it was entered without the knowledge or consent of the defendants, legatees under the will of the said Robert Taylor, deceased, or of their solicitor, and under some arrangement unknown to them : which motion was continued until the October term, eighteen hundred and forty-one, when the same came on to be heard.

G. D. Wall, for the legatees, in support of the motion.

The order of dismissal was made with the consent of the counsel of the executors, but without the knowledge or consent of the legatees, defendants, or their solicitor.

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They had an interest in the subject matter of the suit, and were necessary parties. They had appeared and aided the complainant on the hearing.

The decree was for the benefit of all, and could not be discharged without the consent of the legatees.

2 *John. Chan.* 553; 3 *Paige*, 517; 4 *John. Chan.* 619; *Paige*, 374; 3 *Paige*, 164; 1 *Sim. and Stu.* 479; 3 *Dess.* 20; *Eq. Draftsman*, 213; 2 *Ball and B.* 337; 1 *Jac. and Wal.* 249; 1 *Hoffman's Chan. Pr.* 388, 416; 6 *Cond. Eng. Chan.* 11; 12 *Vesey*, 409; 2 *Sch. and Lef.* 708; 1 *Cond. Eng. Cha.* 414; 2 *Sim. and Stu.* 196.

After a decree, a complainant in a creditor suit cannot dismiss his bill. The decree enures to the benefit of all the parties in interest.

6 *Cond. Eng. Chan.* 403; 5 *Ibid*, 54, 461; 1 *Hoffman Chan. Pr.* 327; *Mitford's Pl.* 77, 79; 1 *Sch. and L.* 296; 4 *Vesey*, 683; 2 *Vesey, sen.* 571; *Wyatt's Prac. Reg.* 179, 184; 9 *Price*, 210.

W. Halsted, contra.

It appears by the master's report, that part of the defendants in the suit are dead, the notice is therefore defective.

The application is too late. The proceedings and decree are required to be enrolled within three months after the final determination of the cause.

Elmer's Dig. 58, sec. 45; *Ibid*, 63, sec. 1.

An enrolled decree cannot be opened on motion.

2 *Smith's Chan. Prac.* 2, 17, 21; 18 *Vesey*, 319; 1 *Vesey*, 93.

A supplemental bill may be filed by the legatees, but the complainant cannot be compelled, against his will, to carry on the suit for others.

All the cases cited on the other side, are those of creditors, on whose behalf the bill was filed, and who have an interest to go on with the suit. There is no case of a defendant's obtaining this privilege. The bill was not filed for the benefit of the

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applicants. It charges that they refused to join in the suit. The complainant being a non-resident, was compelled to give security for costs. He cannot be made liable on his bond, against his consent, nor be put to the hazard of such liability.

One defendant cannot carry on the suit against a co-defendant in the complainant's name.

The doctrine contended for by the adverse counsel, applies only to a final decree. Nor does it apply to a case where a defendant does not appear and answer. He cited also,

11 *Vesey*, 168; 2 *Paige*, 213; 4 *Paige*, 51.

I. H. Williamson, on same side.

After a suit has been dismissed for three years, the cause cannot be restored at the instance of a defendant.

The application must be made by petition, not by motion.

The bill and the whole proceeding are irregular, and the decree might be set aside upon a bill of review.

3 *John. Chan.* 553; 13 *Vesey*, 399; 1 *Cond. Eng. Chan.*

414.

Had the bill been filed for the benefit of all, then the decree of dismissal could not have been made to their prejudice, without notice, but the defendants actually refused to join in the suit.

4 *Cond. Eng. Chan.* 461.

This bill is for the benefit of the complainant alone.

3 *Paige*, 104.

The only mode of relief is to file a supplemental bill. The decree is against dead persons. The supplemental bill may be filed without getting rid of the order of dismissal, and may bring Collins, the present complainant, before the court.

Wall, in reply.

Where the facts of the case appear by the records of the court, and there is nothing to settle but the law arising on those facts, then it is proper to proceed by motion. No petition is required. Here all the facts are before the court.

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These defendants could not have proceeded with a suit in their own behalf, after this bill was filed. The whole controversy was involved and the court would not have permitted another suit to be brought.

The decree has never been enrolled. It ought not to be.

Before a supplemental bill can be filed, this order of dismissal must be removed out of the way.

BY THE CHANCELLOR.* The order of dismissal was improperly made, and must be set aside, except so far as respects the claim of the complainant: as to him it must stand. The legatees who are defendants, are entitled to the benefit of the interlocutory decree, and the master's report thereon; and are at liberty to file a supplemental bill, to obtain the benefit of the said decree, without prejudice from the order of dismissal. But they cannot be permitted to proceed in this suit, in the name of the complainant.

The following order was thereupon made.

"Upon opening the matter to the court this day, it appearing to the court that the bill was filed by the complainant in this cause, to recover a legacy of nine thousand dollars of the executors of Robert Taylor, which was bequeathed by the testator to one Robert Huey or Taylor, son of Martha Huey, in trust, to be divided among the nearest descendants of the testator's deceased sisters, in such proportions and to such persons, as in his judgment he might think most needy, prudent and meritorious; and that in the term of January, in the year of our Lord one thousand eight hundred and twenty-nine, an interlocutory decree was made in this cause, whereby it was ordered, adjudged and decreed, that the legacy so as aforesaid given by the said testator, to the said Robert Huey or Taylor, in trust as aforesaid, did not lapse by the death of the said Robert Huey in the lifetime of the testator, but that the same was a trust in the said Robert Huey for the benefit of the nearest descendants of

* No written opinion was delivered.

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the deceased sisters of the said testator, to wit, Margaret, Elizabeth, Jane, Mary and Ann, and ought to be performed and carried into execution accordingly ; and that the nearest descendants of the said deceased sisters of the said testator, are entitled to have and receive of and from the said Archibald S. Taylor and John A. Taylor, surviving executors of the said Robert Taylor, the said sum of nine thousand dollars, mentioned in the codicil to the will of the said Robert Taylor, deceased, together with the lawful interest thereon from one year after the death of the said testator ; and it was referred to Charles Ewing, esquire, one of the masters of this court, to ascertain who were the nearest descendants of the said deceased sisters, at the date of the said decree, and their names respectively, and the several proportions of said legacy to which they were respectively entitled, to the end that such further decree should be made thereon as the said chancellor might think equitable and just : and that in pursuance of said interlocutory decree, the said master made his report, bearing date on the second day of April, in the year of our Lord one thousand eight hundred and twenty-nine, thereby ascertaining the nearest descendants of the said five sisters of the testator, and the amount of the said legacy : and it further appearing, that although Garret D. Wall appeared as the counsel of the descendants of four of the sisters, and argued the cause on the interlocutory decree, that without notice to him, the said complainant, in the term of January, eighteen hundred and thirty-one, dismissed the said bill ; and it further appearing, that in the term of January, eighteen hundred and thirty-four, an order was made in this cause, that a notice to vacate the said order for dismissal for the reasons therein stated, should stand over to the next term, and that the same was continued from term to term to the last term, at which term, to wit, in the term of October, one thousand eight hundred and forty-one, the said motion came on to be argued in the presence of Garret D. Wall, of counsel with the descendants of Elizabeth, Jane, Mary and Ann, four of the sisters of the testator, and of William Halsted, of counsel with the complain-

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ant, and of Isaac H. Williamson, solicitor and of counsel with the said Archibald S. Taylor and John A. Taylor, surviving executors of the said Robert Taylor, deceased; and the said chancellor having taken time to advise thereon until this day, and now on this twentieth day of January, in the year of our Lord one thousand eight hundred and forty-two, it is ordered and adjudged by his excellency, William Pennington, governor and chancellor of the state of New-Jersey, and the said chancellor by virtue of the power and authority of this court, doth order, adjudge and decree, that the said order of dismissal as aforesaid, made in the term of January, eighteen hundred and thirty-one, be vacated and set aside and entirely held for nothing, except so far forth as respects the claim of the said complainant against the said Archibald S. Taylor and John A. Taylor, surviving executors of the said Robert Taylor; and that notwithstanding such dismissal, the said interlocutory decree and report of master, stand good and effectual so far as respects the nearest descendants of the said Elizabeth, Jane, Mary and Ann, the sisters of the said testator: and that they, or any of them, be at liberty to file a supplemental bill, or an original bill in the nature of a supplemental bill, as they may be advised, to obtain the benefit of and carry into effect the said decree, without prejudice from the said order of dismissal; and that the said interlocutory decree and master's report do stand in full force and strength so far as respects the rights of the said descendants of the said Elizabeth, Jane, Mary and Ann, four of the sisters of the said testator, Robert Taylor, deceased, and that any proceedings by them had on the said decree, be at their own expense and costs, and without any liability of the said complainant therefor."

MARTHA AMOS V. RICHARD AMOS.

A *feme covert* may apply for a divorce for any cause, in her own name, without a *prochein ami*.

Upon a bill for a divorce, the court will, at its discretion, make an allowance to the wife for her maintenance *pendente lite*, and also for counsel fees, whether she be complainant or defendant in the suit.

The allowance to the wife *pendente lite* will be moderate. No inducement should be held out for the oppression of the husband.

The court may make the allowance either with or without a reference to a master.

The allowance may be changed at the discretion of the chancellor, on the application of either party.

Where children are grown up, no allowance should be made on their account.

ON the fourth of January, eighteen hundred and forty-two, the complainant filed her bill of complaint against the defendant, her husband, for a divorce from bed and board, on the ground of extreme cruelty and neglect, and also for alimony and support for herself and her children.

A. O. *Zabriskie*, on behalf of the complainant, now applied for an order upon the defendant for the payment of counsel fees to the complainant's counsel, and also for a proper allowance to the complainant, until the final termination of the suit.

He presented proof of the due service upon the defendant of notice of the application, and also the complainant's petition, verified by her oath.

The petition states that the defendant, more than five years since, by his cruel treatment, compelled the petitioner to leave his house, since which he has made no provision for her support; that the petitioner hath no means of support of her own, but is dependent upon her father, who supports herself and her five children; and that she hath no means whatever of employing counsel or defraying the costs of this suit.

He cited, in support of the motion, *Mix v. Mix*, 1 *John. Chan. R.* 108; *Denton v. Denton*, 1 *Ibid.* 364.

[Amos v. Amos.]

S. Cassedy, contra. The bill is for a limited divorce. She cannot prosecute the suit alone, but must sue by her next friend: *Wood v. Wood*, 2 *Paige*, 454 ; 8 *Wend.* 357 ; 2 *Hoff. Chan. Pr.* 236.

The defendant is entitled to security for costs. The complainant is a non-resident. The husband should not be subjected to the costs and expenses of litigation, without the possibility of remuneration.

Where a husband is complainant, the order for an allowance *pendente lite*, and for counsel fees, may be made, but not when she comes voluntarily into court as complainant.

THE CHANCELLOR. In this state, the practice is settled, that a feme covert may apply for a divorce for any cause, in her own name, without a *prochein ami*.

The court has always found it necessary to aid the wife in the prosecution of the suit, the husband having the whole estate. The court will make the allowance *pendente lite* moderate, and will hold out no inducement for the oppression of the husband. When she is complained against, she has not as just ground for an allowance, as when she is complainant. In either case the allowance may be made, at the discretion of the court.

I deem it unnecessary to refer the matter to a master. That course may be taken, but I have never adopted it. The allowance may be altered at the discretion of the chancellor, on the application of either party. Where children are grown up, it is not proper to make an allowance on their account.

I allow fifty dollars for counsel fees, and two dollars a week for the complainant's maintenance *pendente lite*.

Order accordingly.

THOMAS CHANCE v. ANDREW H. TEEPLE et al.

riority of registry will not avail against actual previous notice of an unregistered mortgage.

one witness, with corroborating circumstances, is sufficient to overcome the defendant's answer.

Where the master has reported the amount due upon several mortgages, and so their order of priority, and upon exceptions taken to the report the order of priority is changed, a final decree may be taken at once, without a reference back to the master.

HEARING on exceptions to master's report.

Wilson and Dayton, for complainant.

Tredenburg, for defendants.

THE CHANCELLOR. The complainant holds a second mortgage upon the premises, and Grant, one of the defendants, a third mortgage. The question is between the second and third mortgages. The complainant's mortgage, though prior in date, recorded after Grant's mortgage.

The only question is, whether the defendant, Grant, at the time of taking his mortgage, had actual notice of the complainant's mortgage: if he had, he is bound by it, and the priority of his mortgage cannot avail him. The master thought the evidence insufficient to prove notice. I am of opinion that the evidence is sufficient to prove notice, and that Chance's mortgage is entitled to priority.

The answer of Grant denies notice; but he denies other matters, in which he is shown to be mistaken. There is the best evidence of one witness, a colored man, who proves that the complainant called on Chance, prior to the date of Grant's mortgage, and told him not to press Teeple, for he, Grant, would take the case next spring.

Sheriff Nease also proves, that the wife of Grant, who acted as agent for her husband, told the witness that she had know-

[Chance v. Teeple et al.]

ledge of Chance's mortgage. Grant, the mortgagee, is also the step-father-in-law, of the mortgagor. The families lived together in the same house. This leads to a strong presumption of notice.

There is another fact that has made an impression on my mind. There are two payments on Chance's mortgage, which money came from Grant. His wife made the payments.

The master has probably felt himself bound by the principle that two witnesses are necessary to overcome the answer of the defendant. This is not universally true; one witness and corroborating circumstances are sufficient.

The exception to the master's report is well taken, and may be allowed. There is no need of a reference back to the master. The complainant may at once take his final decree.

Decree accordingly.

AARON MILLER v. WILLIAM RUSHFORTH.

A final decree after enrollment, and execution issued thereon, and after the lapse of nearly three years from the date of the decree, will be set aside for the purpose of correcting a plain and gross mistake in the master's report, although the defendant appeared and demurred to the bill of complaint, and afterwards suffered a decree *pro confesso* to be taken against him, and an *ex parte* report to be made by the master.

THE case was this. The defendant, Rushforth, on the third of April, eighteen hundred and thirty-five, had given to the complainant a mortgage for three thousand dollars, on which the complainant advanced two thousand and four hundred dollars, and for the residue, agreed in writing to pay off a prior mortgage on the same premises, given by the person of whom Rushforth purchased, to Stephen Terhune, one of the defendants, on which there remained due six hundred dollars. The complainant neglected to pay off this mortgage. Rushforth paid the interest yearly to Stephen Terhune, and also paid

[Miller v. Rushforth.]

the interest on two thousand four hundred dollars to the complainant, for which he took loose receipts, but which were not endorsed upon the bond. The three thousand dollar bond to Miller remaining unpaid, the complainant filed a bill to foreclose his mortgage, to which Terhune, as a prior mortgagee, was made a party defendant.

An answer was put in by Terhune. Rushforth appeared and demurred to the bill, and after the demurrer was overruled, obtained an order for further time to answer. No answer having been filed, a decree *pro confesso* was taken against him, with other defendants, and an order of reference made to a master.

The hearing before the master was *ex parte*, and the report and decree were in favor of Terhune for six hundred dollars, the amount of principal remaining due upon his mortgage, with interest; and in favor of the complainant for three thousand dollars of principal, with interest thereon from the date of the mortgage, no credit having been given for the six hundred dollars of principal, on account of the Terhune mortgage, nor for any payment of interest.

The master's report and final decree bear date on the fifteenth of February, eighteen hundred and thirty-nine. The amount thereby allowed to the complainant, upon his mortgage, exceeded the sum actually due thereon, at the date of the decree, one thousand and fifty-one dollars and eighty-eight cents.

On the fourth of March, eighteen hundred and thirty-nine, an execution was issued upon the decree for the sale of the mortgaged premises. The decree was regularly enrolled. After the mortgaged premises had been advertised for sale upon the execution, and in or about the month of October, eighteen hundred and thirty-nine, the defendant paid to the complainant a bonus of two hundred and nineteen dollars, in consideration that the complainant would suspend further proceedings in said sale, and would give the defendant time to raise the money due on the mortgage. The sale was thereupon suspended.

On the twenty-third of October, eighteen hundred and forty-

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one, the defendant paid to the complainant the sum of one hundred dollars upon the mortgage, whereupon the complainant agreed to give the defendant further time, for one year from that day, to pay off the said mortgage. In violation of the last mentioned agreement, the complainant soon afterwards caused the mortgaged premises to be advertised for sale, by virtue of the execution.

The defendant now applied, by way of petition, for relief. The petition was verified by the oath of the petitioner ; and as to the material facts complained of, was sustained by affidavits taken *ex parte*.

The prayer of the petition was, that the said final decree might be opened, and the petitioner have leave to answer, and that it might be referred to one of the masters of the court, to ascertain and report the true amount due the complainant upon his mortgage.

A. O. Zabriskie, for petitioner, cited, *Miller v. Ford, Saxton*, 367.

J. D. Miller, contra.

THE CHANCELLOR directed the decree to be opened and the matter to be referred to a master, to ascertain the amount due upon the complainant's mortgage, without instructions.

The following order was thereupon made.

" This matter coming on to be heard, at the state house, in the city of Trenton, before the chancellor, in the presence of *A. O. Zabriskie*, of counsel with *William Rushforth*, the petitioner, and *J. D. Miller*, of counsel with the complainant, and the depositions being read, and the arguments of the respective counsel being heard and considered : it is, on this twentieth day of January, eighteen hundred and forty-two, ordered, adjudged, and decreed by the chancellor, that the decree heretofore made in this cause, bearing date the fifteenth day of February, eighteen

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undred and thirty-nine, be opened for the purpose of ascertaining the amount of credits to which the defendant, William Rushforth, is entitled, by virtue of receipts not heretofore allowed, and also by virtue of the mortgage assumed to be paid by the said complainant, and in the said petition as well as in the complainant's bill of complaint referred to; and that the same be referred to Lewis D. Hardenburgh, esquire, one of the masters of this court, to ascertain the same, and report thereon to this court, with all convenient speed. And it is further ordered, that the execution issued on the said decree, be set aside, and all proceedings on the same be stayed until the further order of this court."

JAMES SHREVE and ALEXANDER SHREVE v. THOMAS
BLACK and WILLIAM MCKNIGHT.

As a bill filed for an injunction to restrain waste or irreparable mischief, it is not necessary to set out the complainant's title at length.

Upon the argument of a motion for an injunction, the answer of one defendant will be received, and heard upon the argument as an affidavit, in answer to the complainant's bill.

Cutting off the timber from a tract of woodland, valuable chiefly for the wood upon it, is an irreparable injury.

Injunctions have repeatedly been granted in cases of mere trespass, and that too when committed under pretence of title.

A complainant, by stating the injury to have been committed under allegation of title, does not state himself out of court.

An injunction to restrain irreparable mischief, by the cutting of timber, denied, where the answer alleged the title and possession of the premises to be in the defendants, and denied the title and possession of the complainants.

An INJUNCTION bill, filed on the eighth of December, eighteen hundred and forty-one. The complainants, by their bill, charge, that their father, Joshua Shreve, was in his lifetime and at the time of his death, seized in his demense as of fee, of and in the

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undivided eight ninth parts of all the following described of land and premises, ~~situate in~~ the township of New-Ham in the county of Burlington, butted and bounded as fo (describing it by metes and bounds,) containing about hundred and eighty-six acres. That being so thereof s the said Joshua Shreve, on the twelfth day of July, in the of our Lord one thousand eight hundred and nineteen, made executed his last will and testament, in due form of law to real estate, and did therein and thereby, amongst other things give and devise to the complainants, in fee simple, the eight ninth parts of the said tract of land and premises: and said will, after the death of the said Joshua Shreve, (who on the third day of August, in the year of our Lord one thousand eight hundred and nineteen,) was duly proved and rec in the surrogate's office of the county of Burlington.

That on the ninth day of October in the year of our one thousand eight hundred, the complainant, Alexander Sh and one Charles Shreve, became the owners in fee simple of remaining one undivided ninth part of said tract of land and premises, in equal moieties, by virtue of a deed of bargain and sale from Beulah Newbold, to them the said Charles Sh and Alexander Shreve, bearing date the day and year last said. And that by virtue of said deed of bargain and sale complainant, Alexander Shreve, became the owner and possessor of the one undivided eighteenth part of the said land and premises, as tenant in common with the said Charles Sh and Joshua Shreve; and that by virtue of said devise the complainants became at the death of their father the owners in fee simple of the said undivided eight ninth parts of said tract of land and premises, and that the complainants, Alexander Shreve and James Shreve, then entered into the possession thereof, and have continued to be the owners and possessors of the said eight ninth parts of said tract of land up to the present time.

That the said undivided eighteenth part of said land and premises, so as aforesaid conveyed to the said Charles Sh

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has remained in the possession of him up to the time of his death, and since his death up to the present time in Richard C. Shreve, Alexander R. Shreve, Charles Shreve and Rebecca McHenry, the children and heirs at law of the said Charles Shreve, who died intestate. That the said tract of land is entirely timber and woodland, and is chiefly valuable on account of the wood and timber growing thereon. That the tract is now covered with a thrifty growth of young trees and timber, which is rapidly increasing in size and value, and that it will not be fit for cutting for a number of years; that the complainants for a long time have been in the habit of cutting out the old and dead trees standing and being on the said tract, so that there are now hardly any trees upon it which can be cut without doing irreparable injury to the property; that the present value of the said tract of woodland is about eight thousand dollars, but that if it were permitted to remain in its present condition for ten or fifteen years, it would be worth double that sum; that Thomas Black of Springfield, and William McKnight of Bordentown, in said county of Burlington, pretending to have some claim or title to said premises, under a sale made to them by persons appointed by an act of the legislature of the state of New-Jersey, to sell certain real estate, late the property of Stacy Biddle, of said county, deceased, entered upon said tract of land, with their laborers, in the month of October, in the year of our Lord one thousand eight hundred and forty, and cut down about one hundred cords of the wood thereon growing; that immediately thereafter, the complainants commenced an action of trespass against the said Thomas Black and William McKnight, in the supreme court of judicature of New-Jersey, to recover damages against them for the said trespass; that said suit is still pending undetermined, owing to unavoidable difficulties arising in the prosecution thereof; and the complainants have made necessary arrangements to have the said suit brought to trial at the next circuit court to be holden in and for the county of Burlington, on the second Tuesday of February next, when they hope and intend that the same shall be tried.

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That from the commencement of the said suit, until the ~~six~~teenth day of November, in the year of our Lord one thousand eight hundred and forty-one, the said Thomas Black and William McKnight refrained from cutting the timber and wood growing thereon, and from committing any other trespass on said premises, but that on the said sixteenth day of November, in the year of our Lord one thousand eight hundred and forty-one, and on divers days and times between that day and the twenty-fifth day of the said month, they entered on said premises with their servants and laborers, and cut down large quantities of the wood and timber growing and standing on said premises: that they have cut down the young trees and timber which were not fit for cutting, and by that means have committed great spoil and destruction upon the said premises. They have also begun to clear off the ground, for the purpose of grubbing and converting the soil into arable land; and they give out and declare that they intend to proceed on and cut off the whole or the greater part of the woodland on said tract; that the said Thomas Black and William McKnight have no right or title to the said premises, and that their actings and doings are contrary to equity and good conscience, and that the injury and mischief which they are now doing, and which they threaten to do to the property of the complainants, is irreparable, and for which the courts of common law, in which they can merely recover damages, cannot afford them an adequate remedy and redress, and that unless they be restrained by the order and injunction of this court, they will proceed to the commission of further waste and destruction in the premises.

The bill prays that an account may be taken by and under the direction of the court, of the wood and timber which the defendants have cut upon the said premises, and in what manner, and by whom the same may have been disposed of; and that the said defendants may be decreed to pay the full value thereof to the complainants; and that the defendants may be restrained from committing further waste or destruction on the said premises.

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On filing the bill, the chancellor intimated that the practice the court had been, to deny injunctions upon similar applications, and directed that notice of the motion should be given the defendants. Notice was accordingly given; and pursuant to the notice, the motion was heard at Newark, on the sixth of December. On the fourteenth of December an appearance was entered by the defendants; and on the sixteenth of December, previous to the argument, an answer was filed by William McKnight, one of the defendants.

The answer denies, that to his knowledge or belief, the father the complainants was ever seized of an estate of inheritance the undivided eight ninth parts of the said tract of land, or at the said Alexander Shreve and Charles Shreve, ever became the owners of the remaining ninth part of the said tract, charged in the complainants' bill. Admits that the said Joshua Shreve made and executed a last will and testament, and that he died at or about the time specified in the bill of complaint, leaving the said will unrevoked; but denies that he devised the said eight ninth parts of the said tract to complainants, and if he did, denies that he had any right to do so; denies that to defendant's knowledge or belief, the complainants became seized of the said eight ninth parts of the said tract, on the death of their father, or that they entered into possession hereof as owners, or claiming to be such, or that they have continued to be the owners and possessors thereof up to the present time; denies that the said Alexander and Charles Shreve ever became owners of the other one ninth part of the said premises, or that the children of the said Charles ever became the owners or had the possession thereof.

The answer further states, that Thomas Newbold, being seized and possessed by divers good conveyances, of a large tract of land, including the premises in question, by deed dated the tenth of February, seventeen hundred and seventy-nine, conveyed eighty acres, the south-westerly part of said tract, to Joseph Biddle; that the said Thomas Newbold afterwards died, seized and possessed of the residue of the said tract, inter-

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tate, leaving several children and heirs at law; that on the twenty-first of December, seventeen hundred and seventy-six, letters of administration upon his estate were granted to Ann Newbold, Joseph Lamb and the said Joshua Shreve; that in the term of May, seventeen hundred and eighty-seven, the said Joseph Lamb and Joshua Shreve, the surviving administrators of the said Thomas Newbold, applied to the orphans' court of the county of Burlington, and obtained an order for the sale of the real estate of the said Thomas Newbold, for the payment of his debts; that by virtue of the said order, the said administrators sold a tract containing about four hundred and seventy acres, being the residue of the tract described in the complainants' bill, to the said Joseph Biddle, and conveyed the same to him, by deed dated the tenth day of March, seventeen hundred and ninety; that the said Joseph Biddle thereupon entered into possession thereof, and continued thus seized and possessed until his death; that by his last will and testament, bearing date the seventh of April, seventeen hundred and ninety-one, he devised the same to his son, Stacy Biddle; that the said Stacy Biddle, by his will, bearing date the ninth day of November, seventeen hundred and ninety-seven, devised the same to his mother, Sarah Biddle, for life, and after her death to his sister, Beulah Sansom, for her life, or in tail, and after her death directed his executors to sell the same; that the said Sarah Biddle held and possessed the said land until her death, about the year eighteen hundred and seven; that Beulah Sansom thereupon entered into possession thereof, under the said will of Stacy Biddle, until her death, sometime in the year eighteen hundred and thirty-five, without issue; that during the greater part of this time, James Shreve, one of the complainants, held and occupied the tract as the tenant of Sarah Biddle, during her life, and afterwards as a tenant of Beulah Sansom; that the said Joshua Shreve, in his life time, and the said James Shreve, after the death of the said Joshua, frequently admitted the Biddle title, and never set up any adverse title until after the death of Beulah Sansom.

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that in pursuance and by virtue of an act of the legislature, said premises were sold at public sale, by the administrators, the will annexed, of the said Stacy Biddle, and were struck and sold to the defendants, and conveyed to them by deed bearing date the seventeenth of February, eighteen hundred forty; that immediately after receiving their deed, the defendants surveyed and marked the corners of the said tract, and, after notice thereof given to the complainants, and went into possession, and have ever since held the possession thereof; the defendants have been informed and believe that the complainants, or one of them, have obtained the possession of said deeds of Joseph Biddle, and have suppressed them.

He answer further states, that the defendants were bona fide purchasers, and that they paid the purchase money for said tract, and that soon after the purchase they cleared off and converted four acres of the tract into arable land. Admits that an action of trespass was commenced therefor, by the complainants, which is still pending, as charged in the bill; and that the defendants, with the view of speeding the cause, have compelled the plaintiffs to bring on their cause, or be nonsuit. Admits that the said tract consists chiefly of timber and wood, which constitutes a very essential part of its value; but admits that the soil is also valuable, and may advantageously be converted into arable land; that the defendants have determined to convert more of the tract into arable land, and with that view, are cutting and clearing in the usual and ordinary manner; that the timber is ripe and fit for cutting, and will deteriorate if left standing; denies that the defendants are committing waste or doing irreparable injury to the land, but on the contrary, insists that they are managing the same in the best and most advantageous manner for their own interest; states that the defendants have entire confidence in their own title, that the complainants have no title to the premises; and that if the defendants are mistaken in regard to their title, they are able and willing to respond in damages to those who have claimed that they purchased in good faith, paid the consideration

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money bona fide, and are now and have been ever since the conveyance so made to them as aforesaid, in the lawful and actual possession of the said premises.

Moffett and *H. W. Green*, in support of the rule.

The ancient rule of the court in regard to granting injunctions in cases of trespass, has been relaxed: 1 *Mad. Prac.* 147; *Eden on Inj.* (1st. Am. ed.) 136.

Injunctions have been frequently allowed in cases of trespass, and that where the title has been disputed or denied by the defendants. Though courts have uniformly asserted the principle, that an injunction in cases of mere trespass will not lie, yet it has been continually relaxed to prevent irreparable mischief, or to guard the inheritance from destruction.

Flamang's case, 7 *Vesey*, 307; *Robinson v. Byron*, 1 *Bro. Cha. C.* 588; *Mitchel v. Dors*, 6 *Vesey*, 147; *Crockford v. Alexander*, 15 *Vesey*, 138; *Kinder v. Jones*, 17 *Vesey*, 109; *Cowper v. Baker*, 17 *Vesey*, 127; *Grey v. Earl of Northumberland*, 17 *Vesey*, 281; *Thomas v. Oakley*, 18 *Vesey*, 185; *Whitechurch v. Holworthy*, 19 *Vesey*, 213; *Fingal v. Blake*, 2 *Malloy*, 50; *Shubrick v. Guerard*, 2 *Dess.* 616, 622, n.; *Kane v. Vandenburg*, 1 *John. Chan.* 11; *Livingston v. Livingston*, 6 *John. Chan.* 500; *Hawley v. Clowes*, 2 *John. Chan.* 122; *Eden on Inj.* 115, 122, 141, 216, 217; *Blanchard v. Cawthorne*, 6 *Simons*, 155.

That in cases where the injunction has been denied, the same principle has been admitted.

Pillsworth v. Hopton, 6 *Vesey*, 51; *Hanson v. Gardiner*, 7 *Vesey*, 307; *Smith v. Collyer*, 8 *Vesey*, 89; *Norway v. Rowe*, 19 *Vesey*, 152; *Stevens v. Beekman*, 1 *John. Chan.* 318; *Storm v. Mann*, 4 *John. Chan.* 21; *Jerome v. Ross*, 7 *John. Chan.* 315; *Scudder v. Trenton Delaware Falls Co. Saxton*, 718; *Southard v. Morris Canal and Banking Co. Saxton*, 520; *The New-York Printing and Dyeing Establishment v. Fitch*, 1 *Paige* 97; *Hart v. Mayor of Albany*, 3 *Paige*, 213; *Higgins v. Woodward*, 1 *Hopkins*, 342.

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The answer of one defendant will not avail against the case presented by the bill. The court will not dissolve an injunction unless an answer be put in by all the defendants upon whom the gravamen of the charge rests. If the answer of one defendant will not avail to dissolve an injunction when issued, it cannot so far affect the case made by the bill as to prevent the suing of the injunction, especially when filed before subpoena sued, and on the eve of the argument: 1 *Hoff. Chan. Prac.* 30; *Depeyster v. Graves*, 2 *John. Chan.* 148.

Wall, for defendants, contra.

1. The bill is radically defective; it does not set out the complainants' title. When a party comes into equity for the protection of his title, he must show fully what his title is.
2. The bill contains no equity. There is no case shown here an injunction has been issued, except in a case of nuisance, or to prevent irreparable injury. The cutting of wood, valuable only as timber, has never been enjoined. The practice in this state has been, to deny applications in similar cases. I cited the opinion of chancellor Vroom, in *West v. Walker*.*
3. The case is relieved from all difficulty by the answer. It denies not only the title of the complainants, but the whole equity of the bill. Under such circumstances, the injunction, if sued, would be at once dissolved. If not conclusive as an answer, it is, at least, admissible as an affidavit.

THE CHANCELLOR. After a careful examination of this case, I feel constrained to deny the injunction. I do so from the facts as they appear by the bill and answer. The complainants' title was sufficiently stated in the bill, and the objection that it is not set out in detail has no weight in my mind. The answer, too, although made by one of the defendants, must be received, at all events, as an affidavit. This answer shows a title in the defendants, clearly traced through the ancestor of the complainants. One of the complainants is stated

* Since reported, ante, vol. ii. page 279.

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to have been in possession as tenant of those claiming under the same title with the defendants. And it is further stated, that not only the father of the complainants, but that the complainants themselves, or one of them, have admitted the Biddle title, under which the defendants claim, and have never until lately claimed by any adverse title.

The possession, too, is alleged to be now in the defendants, and to have been in them since they acquired title, and previous thereto, in those under whom they claim. Without, therefore, expressing or entertaining any opinion as to the merits of the title, or the result of the case at law, I am quite clear upon these facts, that I should not be justified in interposing the arm of the court of chancery.

I have been led to this result by the particular circumstances of this case, in which it is a source of some satisfaction to know that the defendants are able to respond at law.

I confess that the discussion before me, and the tracing of the English cases, has staggered my faith in the view which has been taken by some of my predecessors on this subject. Injunctions have repeatedly been granted in cases of mere trespass, and that too, when committed under pretence of mere title. The complainant, by stating the injury to have been committed under allegation of title, does not state himself out of court, as to the injunction. This kind of injury, too, by cutting timber on land where it constitutes its chief value, is an irreparable injury.

My embarrassment is not so much about the title as the possession. When this is claimed by the defendant, as well as the title, and that too in connection with the title, what right has the court to interfere? To enjoin both parties until a trial is had, must result in tying up all unimproved lands, about which there is any dispute, from being enjoyed by their owners.

Injunction denied.

C A S E S

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY,

APRIL TERM, 1842.

ANDREW PARSONS v. The MONROE MANUFACTURING
COMPANY.

The act entitled "An act to prevent frauds by incorporated companies," passed February sixteenth, eighteen hundred and twenty-nine, applies not only to banks, but to all incorporated companies other than those specially excepted in the twenty-first section of the act.

There are certain provisions of the act intended to apply to banking companies alone, and when so intended they are referred to as "banks." But the act itself, by its general provisions, goes further, and reaches other corporations, and may be carried out as to them, without the aid of those special sections which are applicable to money corporations alone.

An injunction may be issued under the act, against a bank or other corporation, before the company have actually suspended business.

Where the bill of complaint charges, that the complainant is a stockholder and creditor of the company for a large amount, and specifies in what his claim, as a creditor, consists; that he has repeatedly called on the president of the company for payment, but that he has always failed to make payment; that the president has the entire control of the company; that he is insolvent and uses the property of the company for his own use; that the company is, to the belief of the complainant, insolvent, and unable to pay its debts, and unless this court interferes the whole property will be squandered; specifies various unauthorized acts committed by the president, subjecting the property of the company to the incumbrance of mortgages and judgments, without the authority of the board of directors; charges

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that the company owe a large amount of debts to other persons; that executions are in the sheriff's hands, by virtue of which the property of the company is advertised for sale, and that the company is insolvent according to the complainant's belief, owing to the mismanagement of the president: The facts and circumstances set forth are sufficient to justify the action of the court, and the bill is therefore particular enough in the allegations made.*

The whole proceeding under the act must rest upon the insolvency of the company. Unless that is satisfactorily made out, the court has no jurisdiction.

If the insolvency of the company is established; there still resides in the chancellor a discretion as to the ordering of an injunction and the appointment of receivers, to be governed by the facts and circumstances of the case.

The court may restrain a company from carrying on its ordinary business, or a bank from issuing notes, and yet leave the directors to settle up its affairs —

In judging of the solvency or insolvency of a company, its property should be estimated at its fair value, and not at the depreciated price which it might command at a forced sale.

The most unfavorable inference as to the condition of a corporation, may justly be drawn from the circumstance of the company's withholding its books upon an investigation touching its solvency.

If the insolvency of the company is satisfactorily established, and the circumstances of the case, in the opinion of the chancellor, call for his interference, an injunction will issue, though many of the creditors and stockholders petition against it.

THE bill of complaint in this cause, was filed on the twenty-eighth day of January, eighteen hundred and forty-two, by Andrew Parsons, a creditor and stockholder of "The Monroe Manufacturing Company," on behalf of himself and of all others who should come in and seek relief by, and contribute to the expense of this suit. The bill charges, that by an act of the legislature of the state of New-Jersey, passed the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and thirty-eight, entitled, an act to incorporate "The Monroe Manufacturing Company," it was among other things provided, that a subscription might be opened for the stock of

* See the charges of the bill set forth at length, *post*.

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said company, not to exceed two hundred thousand dollars, in shares of one hundred dollars each, and that as soon as fifty thousand dollars should be subscribed and paid, it should be lawful for the said company to commence their business; and the said act did appoint Samuel G. Wheeler, Patrick McGinnis, Jeremiah Carpenter, Arthur McGinnis and George A. Bicknell the first directors of said corporation; and it was further provided by said act, that Samuel G. Wheeler, Patrick McGinnis, Jeremiah Carpenter and Arthur McGinnis, and the survivors of them, and all such persons as might thereafter be associated with them, should be and were thereby constituted a body, corporate and politic, by the name and style of "The Monroe Manufacturing Company," for the purpose of manufacturing cotton and woolen goods, and dyeing, printing and bleaching cotton, woolen and silk goods, in the town of Paterson, and of carrying on the business incident thereto; and by that name they and their successors should have succession and continue a body politic and corporate, and should in law be capable of contracting and being contracted with, suing, pleading, defending and answering, and being sued, impleaded and answered unto, in all courts and places whatsoever, and that there should be five directors of said company. That by virtue of the said act of incorporation, the said company went into operation, and commenced business in Paterson, and one hundred thousand dollars having been subscribed, the company commenced operations, and have continued to transact their business as authorized by said charter to the present time:—that the complainant hath become a large stockholder in said company, and that he now holds two hundred and thirty-five shares of the capital stock of said company, amounting at par value to twenty-three thousand five hundred dollars; and further that the said company is indebted to the complainant in a large sum of money, among other things in the sum of five hundred dollars upon a draft given by said company in the complainant's favor, upon H. L. Van Wyck, for five hundred dollars, payable on the twenty-eighth of September, eighteen hundred and thirty-nine,

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and which draft has been protested; also in the sum of eight hundred and fifty dollars, on the note of said company, dated May first, eighteen hundred and thirty-nine, at sixty days; also in the sum of eight hundred and forty dollars and forty-four cents, on the note of said company, dated May the sixteenth, eighteen hundred and thirty-nine, at three months; together with the interest on these three claims.

That the complainant has repeatedly called on the president of said company, Samuel G. Wheeler, and requested him to pay to the complainant the said moneys due to him; that he has repeatedly promised to pay the complainant, but he has always failed to perform his said promises; that the said Samuel G. Wheeler, the president of the said company, has the entire control and management of the affairs of said company; that he uses the property of the said company as his own; that the said Samuel G. Wheeler is utterly insolvent; that all his property has been sold that could be found, and that a large amount of judgments against him in this state remain unsatisfied. That the said company, as the complainant believes, is insolvent and unable to pay its debts, and that unless this honorable court interferes the whole of the property will be squandered.

That the said company, by its president, on the sixteenth day of June, eighteen hundred and forty-one, without any order of the board for that purpose, executed a mortgage upon all the mills, lots of land, and water privileges, and also on all the machinery, gearing and appertenances, to Herman Swift, Edward H. Swift and Hamilton Gay, for the sum of fifteen thousand dollars; and that lately, on the nineteenth day of January, eighteen hundred and forty-two, he has confessed judgments for said company to the said Hamilton Gay, in the court of common pleas of Passaic county, for the sum of thirty thousand dollars of debt, besides costs; and another judgment to him in the same court, for the sum of five hundred and seventy-two dollars, besides costs; and that since then he has confessed another judgment to one Henry C. Stimson, for about three thou-

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said dollars; and that all these three judgments have been confessed without any order of the board for that purpose; and the complainant is informed and believes that there is a large amount of debts due from the said company to different persons, and that there are other judgments against the said company besides those above referred to, and that executions on all the judgments are now in the hands of the sheriff of the county of Passaic to be executed, and that he hath advertised the same for sale; and the complainant believes that the said company is insolvent, owing to the mismanagement of the said president, who has the entire control of the business; and the complainant believes that the said Samuel G. Wheeler uses the funds and property of the said company for his private benefit, and that the said company, in order to avoid the payment of their just debts, have suspended payment of their debts, and refuse and neglect to pay to the complainant what is justly due to him as aforesaid.

The prayer of the bill is, that the defendants may set forth and discover the goods and chattels, rights and credits, moneys and effects, and real estate of every kind and description, belonging to the said corporation, and that the complainant and the other creditors and stockholders of the said company, who may come in as parties to this suit, and contribute to carrying on the same, may be paid what is justly due them; and that the said "The Monroe Manufacturing Company," their officers and agents, may be enjoined from receiving any of the debts due to the said corporation, and from paying or transferring any debts, moneys or effects of the said company, or from exercising any of the franchises or privileges granted by the said act of the legislature above mentioned and referred to; and that a receiver or receivers or trustee may be appointed, with full power and authority to sue for, collect, receive and take into his or their possession, all the goods, chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description, belonging to said company at the time of their suspending business as aforesaid;

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and to sell, convey and assign all the said real and personal estate of the said company, and to bring into this court all the moneys and securities for moneys arising from such sale, or which the said receiver or receivers or trustee shall collect or receive by virtue of the authority vested in them, and according to the act of the legislature in such case made and provided. There is also the usual prayer for general relief.

Upon filing the bill the following order was made. "Upon opening the matter this day to the court, by Mr. A. S. Pennington, of counsel with the complainant, and upon reading the bill of complaint in this cause, and the affidavit thereto annexed, and on duly considering the same, it is ordered that the same be filed, and that thereupon an injunction do issue against the said defendants, according to the prayer of the said bill, except so far as to allow the defendants to manufacture goods until the further order of this court. And it is further ordered, that the hearing for a full injunction, and appointment of receivers of the said company, be fixed for the fifth day of February, eighteen hundred and forty-two, at Trenton, at ten o'clock, A. M., and that notice be given to the said company of the same."

On the fifth of February the hearing was postponed on the application of the defendants, to the fourteenth day of March, on which day the cause came on to be heard before the chancellor, at Newark, upon the motion for injunction and appointment of receivers. Numerous depositions, ex parte affidavits and exhibits were taken and made by both parties, which were used upon the hearing, copies of the affidavits having been served according to the rules and practice of the court. Among other papers, a petition was presented on the hearing to the chancellor, from persons holding a large majority of the stock, praying that the injunction should not issue.

A. S. Pennington and I. H. Williamson, for complainants, in support of the motion.

O. S. Halsted and A. Whitehead, for defendants, contra.

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A. S. Pennington. The only question is, whether this company is insolvent; if the company be insolvent, the stockholders have no interest. The creditors and the community are interested, and it is for the public welfare that unsound institutions should be broken up.

The company may be placed in such a position, by judgments and executions against it, as to render it virtually insolvent; but if its property be rescued from forced sales, and its affairs managed under judicious management, it may ultimately pay its debts in full.

Such was the case with the Mechanics' Bank at Paterson. It was declared insolvent; it was so, in fact, but having been placed in the hands of receivers, its debts were eventually paid. The present direction, consisting of five persons, leaves the control of the company in the hands of the president; his salary is two thousand dollars per annum; the secretary, appointed by him, receives eight hundred dollars.

The company refuse to show their day book and ledger. They must then, upon every principle, infer every thing against

Had not the contents of the books been fatal to the credit of the defendants, they would have been produced.

The president admits that he has used the funds of the company for his private purposes; his excuse is, that he always balanced himself in the books of the company, with the amounts

It appears, that on the twelfth of February, eighteen hundred and twenty-nine, he took of the funds of the company six thousand dollars, and assigned them his stock to that amount, at par, when in reality the stock was worth nothing. He was indebted to the company over eight thousand dollars, and in payment, he transferred to the company a note of Carter for that amount, which is of no value.

On the first of September, eighteen hundred and thirty-eight, he transferred to Mr. Colt fifty shares of his own stock, and reduced therefor assets of the company to that amount, by a debit on the books.

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On the fourth of May, eighteen hundred and forty, he transferred three shares of his stock to Mr. Lowe, and got a credit on the books of the company for that amount.

He has placed a mortgage upon the property of the company for fifteen thousand dollars, and has confessed judgments in their name for large amounts, without the authority of the board of directors.

He alleges that the company have met with no losses, and done a good business, yet it has never made a dividend. And what is now its condition? Where are its assets?

The whole value of the company's property, real and personal, as ascertained by the complainant's evidence, is forty-nine thousand five hundred and forty-four dollars and eighty-one cents. The value of this property, at a forced sale, would, as appears by the evidence, be reduced to thirty-five thousand dollars.

The debts of the company, some of which are disputed, amount to seventy-six thousand seven hundred and ninety-five dollars and seventy-four cents.

Taking the property at its appraised value, the insolvency of the company will be twenty-seven thousand dollars; if disposed of at a forced sale, it will amount to forty thousand dollars.

The president told Stimson that the company could not pay over fifty cents in the dollar; he has said the same thing, in substance, to others. By general reputation, the company is insolvent. But one witness has been inquired of by the company as to their credit, and he did not go so far as to say he would give them credit for one hundred dollars.

If the injunction be removed, the mortgage to Gay will be confirmed by the board, and the whole property of the company would be in his hands. The business of the company is now, in fact, carried on by him; without his aid their operations must at once cease.

Mr. O. S. Halsted, for defendant, contra.

The act under which this proceeding is adopted, if applic-

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ble to any other corporations than banks, must have reference alone to the creditors and stockholders, not to the public.

It is denied to be a mere question of the company's insolvency. But is it, in the opinion of the court, for the interest of the creditors and stockholders to put the company into process of liquidation? That is the true and only issue.

From an examination of the phraseology of the act, and especially of the sixth section, it is manifest that it was not intended to apply to a company in a state of embarrassment, or temporary inability to pay its debts. Upon the complainant's construction of the act, a company may, from unexpected losses, or sudden revulsions in business, or the monetary affairs of the country, be laid hold of and crushed, by the interruption of its business and a forced sale of its property, when if left alone, it would recover from its embarrassments, pay its debts, and be enabled to continue its business.

Place the construction contended for by the other side, upon this act, and incorporated manufacturing companies must cease to exist.

The phrase "not about to resume," used in the sixth section of the act, shows that it was designed to reach only prostrate institutions.

A company is not insolvent because at a forced sale of its property it may not be able to pay its debts. The view to be taken is broader; unless the interests of the creditors and stockholders require this proceeding, it cannot be properly sustained.

The object and effect of the present proceedings, is to produce insolvency. The difference of one cent per yard in the sale of its manufactured goods, will increase or diminish the profits of the company thousands of dollars.

It appears by the evidence, that the company is now manufacturing for Gay, he furnishing the raw materials. They may thus do a profitable business without hazard, and be enabled to redeem themselves.

If the company, at this time, upon a cash valuation, or even

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at a fair valuation of their stock, cannot pay all their debts. It does not follow that this proceeding can be sustained.

At this juncture in the political condition and business prospects of the country, it is a harsh and cruel proceeding in the operations of this company.

The yearly product of the business of the company is ten per cent. on one hundred thousand dollars. This has not been taken into account in any of the valuations of the company's property. In eighteen hundred and thirty-eight, this property was valued by disinterested men at seventy-six thousand dollars. Improvements have since been made to the value of the property to the amount of ten thousand dollars.

The complainant's mortgage is second in order of priority and is therefore safe. His claim on notes and other securities, if secured, is subsequent to all the mortgages and judgments. A forced sale will therefore be prejudicial even to him.

The stockholders and creditors all object to this proceeding. Not one of them advocates it except the complainant.

They alone are interested in this proceeding, the public has no concern with it. The term "safety to the public," used in the act, showed that the act has reference only to banks and not to other incorporated companies.

The insolvency of the president of the company, is denied. But that can have no bearing on the case, if he is competent and commands the confidence of the stockholders.

Mr. A. Whitehead, on the same side.

This proceeding calls for the exercise of a very high discretion. It should not be exercised unless the proof be clear and explicit.

The complainant's bill is defective. It does not contain sufficient charges to warrant the interference of the court.

1. The insolvency of the company is not shown or proved. The allegation is, that the company are indebted to the amount of \$100,000. There is no statement of facts that warrants the inference that the company is insolvent.

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There is no averment that the company have suspended business. There can be no case that will justify the court in acting by injunction under the act, (except against a bank,) the company have actually suspended their business.

a company is in its regular course of business, the court has no jurisdiction. This is apparent from the phraseology of the act. It speaks of "suspending business," and "not about suspending its business." In the case of a bank it may be otherwise, because there are certain tests given, which are evidence of suspension, such as not paying notes when presented, &c. There is nothing imperative on the chancellor to act, even if insolvency be proved. "The circumstances of the case, and the demands of justice" requiring it, he may appoint receivers, not otherwise. There is a clear discretion to be exercised by the chancellor, in view of all the facts of the case. There must be some interest advanced, in order to justify the proceeding.

This application has been induced by the refusal of the defendant to pay his private debts with the property of the company.

Upon the complainant's own show, a sale will not pay the prior mortgages, and must be ruinous to the interests of the general creditors of the company.

The claim of the complainant against the company, is only limited by the defendants to the amount of about sixteen hundred dollars.

Other claims are disputed; some of them are for unliquidated debts. The actual amount of the company's indebtedness is much less than is represented by complainant.

The question as to the management of the company by the defendant, cannot enter into this case.

The mill is now in good order and in successful operation. It ought not to be interrupted. The interest of no one will be injured by the proceeding.

H. Williamson, for complainant, in reply.

The power of the court is complete, when a company is insolvent, it need not have stopped business.

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It is not compulsory in the court to interfere, even in a case of insolvency; there is a discretion to be exercised on the case. This is admitted. The power is tremendous, but salutary.

The bill need not charge that the company cannot run its business, but must charge insolvency.

The general scope of the act, its several provisions, and particularly the last section, declaring what corporations it does not extend to, shows that the act applies to manufacturing companies.

If a company must first suspend before the act operates, then the act is useless.

A company is insolvent when their capital is gone; and they cannot and do not pay their debts.

This company is insolvent from their own show.

Out of the assets, put down at sixteen thousand dollars, there is not over one thousand and five hundred dollars that is good.

No dividends have ever been made. It is no part of the case to what the prospects are, but are they now insolvent? That is the question. The president admits the company unable to pay. See the evidence of Mr. Stimson. Mr. Biggs, who built the water-wheel, would not trust them. Wheeler wanted him to take fifty per cent. on his debt, in notes. In December, eight hundred and forty, Wheeler wrote a letter to the complainant saying the company could not pay, and requested him to take the stock at seventy-five per cent. or fifty per cent. Is the company worth any thing? Would any body give any thing for it?

Why do not the company produce their books of account? If the company is solvent and all is right, why do they not hold their books? They refused them to Mr. Parsons, a creditor to the master, to us and to this court. On this ground the presumption is against them.

The company being insolvent, the only question remaining is, whether this is a case calling for the interference of the court. It loudly calls for it.

The charter is abused. The board consists of five directors.

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And a majority being three, may control. The act requires a book to be kept of their proceedings. It appears that Wheeler and McGinnis subscribed all the stock except two shares, and those to make directors of. Wheeler and McGinnis owned the mill known as the Beaver mill, before this company was constituted. The business has never been conducted by a board of directors.

Mr. Wheeler has been in the habit of using the funds for his private purposes, as appears by his own affidavit. He admits he has given the company notes for his private debts, and was charged with them in the books, and they were settled. How? To what extent? He does not state, nor is it otherwise made to appear. Carpenter's note is dated in June, and in December he enters the note to his credit.

The president sold part of the lands of the company; gave a mortgage to Mr. Gay for fifteen thousand dollars, in the name of the company. He has confessed judgments in behalf of the company. This property was about to be forced to a sale. It is a strong case; the strongest possible. The course taken by the complainant was his only course to save his money.

The creditors and stockholders signed their request that no judgment might issue, under the belief that the company is solvent.

This law was made for the protection of the public, as well as for the creditors and stockholders, and their safety should be regarded in proceedings under it.

THE CHANCELLOR. The Monroe Manufacturing Company was incorporated on the twenty-fourth of February, eighteen hundred and thirty-eight, by a law of this state, for the purpose of manufacturing cotton and woolen goods, and dyeing, printing and bleaching cotton, woolen and silk goods, in the town of Paterson. The provisions of the act are much the same with those in ordinary charters of this kind, with a capital not to exceed two hundred thousand dollars, to be divided into shares of one hundred dollars each, but with power to commence busi-

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ness whenever fifty thousand dollars of the capital stock should be subscribed and paid in. The number of directors fixed by the act is five, and of course three is a majority for the transaction of business.

The application for this charter was made by Samuel G. Wheeler, who was the principal owner at the time of the Beaver mill, with its machinery and appendages, and who, being much embarrassed, deemed this arrangement beneficial to his interests. The result was nothing more than putting the Beaver mill, with its machinery and appertenances, then belonging to Mr. Wheeler and Patrick McGinnis, (but principally the former,) into a joint stock company, and dividing it up into shares of one hundred dollars each. Accordingly, among the first directors named in the act, were these two gentlemen, with three others, who appear to have been their friends and relatives. Shortly after the act passed, the subscription for the stock was opened, and Samuel G. Wheeler subscribed seven hundred and forty-eight shares, Patrick McGinnis two hundred and fifty shares, Arthur McGinnis one share, and Jeremiah Carpenter one share—being in all one thousand shares, which, at one hundred dollars a share, made a capital of one hundred thousand dollars. On the same day the directors met, and resolved that the Monroe Manufacturing Company purchase of Samuel G. Wheeler and Patrick McGinnis, the cotton and woolen mills, dye-house, and all the machinery belonging to the same, and known as the Beaver Mill Company, for the sum of one hundred thousand dollars, and that certificates of stock to that amount, (except the two shares subscribed for by Arthur McGinnis and Jeremiah Carpenter,) be issued to Samuel G. Wheeler and Patrick McGinnis.

By this division of the stock, the whole power of the company and over the property, was placed in the hands of Samuel G. Wheeler, as much so as it had been while conducting the Beaver mills; and to add to it, he was appointed president, with a salary of two thousand dollars a year; and by one of the by-laws, that officer is invested with the entire oversight



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and supervision of the property and affairs of the company, is to direct the purchase of all stock and other things necessary to carry on the works, is to direct in the sale of all goods, to collect all bills of work done by the company, and arrange the hire of all clerks and operatives necessary to carry on the business. There was a secretary appointed, and a clerk, whose salaries were also to be fixed by the president.

After this organization, and the adoption of the by-laws, the minutes of the company do not show any thing more done than the holding of an annual election for directors, and the reappointment of the president and secretary, except a vote of the directors authorizing Samuel G. Wheeler to take for his own use an inventory of property amounting to six thousand five hundred dollars, by surrendering to the company the same amount of the capital stock.

Thus organized, and with such powers conferred upon the president, this company commenced business, and has continued to the present time. The stock, according to the books, is now scattered, and held either absolutely or as collateral security, by others than the original subscribers; Samuel G. Wheeler appearing to be the owner of ten shares only, and Patrick McGinnis of none.

The sale of six thousand five hundred dollars worth of the company's property, although taken at the price at which it was inventoried, and although the stock of Mr. Wheeler was transferred for its payment to the same amount, still reduced the ability of the company to pay debts so much; and the president admits that he may have given the notes of the company for his own debts, but never without being charged with them on the books of the company, and they have been settled. It also appears that the Carpenter note, for eight thousand dollars, was passed to the company by the president, in discharge of his indebtedness to them. The president also admits himself personally insolvent.

The present bill is filed by a creditor and stockholder, against the company, as being an insolvent institution, for an injunc-

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tion to stop its further operations in business, and for the appointment of receivers to settle up its affairs, under the provisions of the act, entitled, "An act to prevent frauds by incorporated companies," passed the sixteenth of February, eighteen hundred and twenty-nine. When this bill was presented, a limited injunction was ordered, to restrain the company and its officers from collecting and receiving debts, or paying out any of the moneys of the company, (except to the hands employed,) or from selling any of the property, or transferring the securities on hand, (but not stopping the ordinary business of the mill,) until the parties could be heard; and notice of the application for a more full injunction, and the appointment of receivers, was directed to be served on the defendants. That notice was served, and on the day named a further time was granted the defendants to prepare to meet the charges in the bill. Depositions have been taken fully on both sides, and the cause argued much at length, and with great ability, and I am now to state to the parties the result to which I have come.

A grave question is made at the outset, whether the provisions of the act under which this proceeding is had, applies to a corporation created for manufacturing purposes, or indeed to any other corporation than a bank? That the primary object of the legislature was to reach banks, is manifest from the whole scope and tenor of the act. Some of its provisions declare when a bank shall be deemed and taken to be insolvent, as when two of the directors, or the cashier, shall admit it to be so, or it shall refuse to pay its debts when demanded within the usual and proper hours of business, or shall not redeem its notes in specie, &c. These were designed as tests, which the court might take on the question of insolvency, and, no doubt, from the difficulty without them of coming to any conclusion on so difficult and delicate a point. I have never, however, considered these as any thing more than evidences of insolvency, which may be overcome, even in the case of a bank, by other and stronger proof. The court would, no doubt, be justified in act-

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ing upon these, in the first instance; but they may be explained, and the institution shown to be sound and safe.

But because this special provision for discovering insolvency, is made in the case of a bank, it by no means follows that other portions of the act may not have a more general operation. When, in these sections, special reference is had to a bank, it is called a bank, or an incorporated bank, or a banking company, while in the other general provisions they are referred to as "incorporated companies," without qualification or limitation. The title of the act is, "An act to prevent frauds by incorporated companies," not by banks only; and the sixth section, which authorizes the chancellor to act, declares that he may do so whenever any incorporated company shall become insolvent.

By a fair construction of the act, it is manifestly the intention of the legislature to confer this power (which I admit to be very great) of granting injunctions in cases of insolvency, against other companies than incorporated banks. There are certain provisions intended to apply to those only, and when so intended, they are referred to as banks; but the act itself, by its general provisions, goes farther, and reaches other corporations as well as these, and may be carried out as to them without the aid of those special sections which are applicable to money corporations alone.

If any doubt, however, existed as to this part of the case, it should be settled by the last section of the act. By that section, it is provided, that nothing in the act should apply to any incorporated bridge, road or turnpike company, or literary or religious society.

The corporation in question here, is confined to manufacturing purposes alone, and being within the plain meaning of the words used in the act, and not coming within the exceptions in the last clause, must, as it appears to me, be considered within the general object and intention of the legislature. This was so held in the case of the Rahway Manufacturing Company, and an injunction ordered, and a receiver appointed by my immediate predecessor, and sustained by the present chief

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justice sitting for the chancellor, although the order was reversed afterwards upon the merits, in the court of appeal.

It is further insisted, that this power of issuing an injunction, cannot be exercised against a corporation, other than a bank, until the company has actually suspended business. The phraseology, in many parts of this act, is obscure, and there is something in the language used in the sixth section that might, at first view, lead to this impression. The language is, "if upon such inquiry into the matters or cause of complaint, it shall be made to appear to the chancellor, that the said company has become insolvent, and shall not be about to resume its business in a short time thereafter, with safety to the public and advantage to the stockholders," then an injunction may issue.

If it be admitted (and the argument virtually so admits) that you may enjoin a bank under this act, before its suspension, then certainly you may any other corporation coming within its provisions, for it is under the same section (the sixth) that the power is conferred, and it is alike in all cases. By the seventh section, it is quite plain, you may proceed against a bank while pursuing its usual course of business, if either of the events there stated happen; and indeed without this power, if the court must wait for a suspension, all use of the act for the prevention of evil, would be lost. There is nothing that I can perceive in this respect, to distinguish the application in the case of a bank, from that against any other company, and this section was no doubt intended to mean nothing more, than that in cases where the company has suspended business, the chancellor will enquire into the prospect of its resuming again, with safety to the public, and was not intended to limit the powers of the court to the happening of such an event. In some cases the company will have stopped business, and in some not; if they have stopped, it will then, and very properly, enter into the consideration of the case, as to what the prospect of its again resuming is.

It is further urged, that if this law applies to this company,

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too while carrying on business ; that the bill is imperfect, and does not contain the charges necessary for use. The objection to it is, that the facts and circumstances of the case are not sufficiently set forth to enable the court to determine on the propriety of interfering.

The bill has been carefully looked into this bill, and it does not appear to be subject to this objection. The complainant declares himself to be a stockholder and creditor for a large amount, and in what his claim as a creditor consists ; that he has repeatedly called on the president of the company for payment, but has always failed to make payment. The bill then states that the president has the entire control of the company, and that he is insolvent and uses the property of the company for his own use ; that the company is, to the knowledge of the complainant, insolvent and unable to pay its debts, and that if this court interfere the whole property will be squandered. The bill then recites the unauthorized acts of the president, in giving a mortgage for fifteen thousand dollars upon all the real estate of the company to the Swifts and Gay, and a confession of judgment for the same amount to Mr. Gay ; by confessing another judgment to him for five hundred and seventy-two dollars, and another to Henry C. Stimson for three thousand dollars, without authority from the board of directors. Besides these judgments, it is charged that the company owe a large amount of debts to other persons, and that other executions bearing on the judgments above stated, are in the hands of the sheriff of Passaic county, and that the property is now advertised for sale by the sheriff on the said executions. The bill is stated, further, to be insolvent, according to the declaration of the complainant, from the mismanagement of the pre-

sents to me that the facts and circumstances here set forth are sufficient, if true, to justify the action of the court, and that the bill is, therefore, particular enough in the allegations. It would, indeed, be very difficult for a creditor, in a large number of cases, to go more into detail than is done in this bill.

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The great questions to which we must come in this cause, are, first, Is this company insolvent within the meaning of the act? and, second, Do the facts and circumstances of the case call for the interference of the court?

I agree entirely with the counsel of the defendant, that the foundation of this whole proceeding must rest on the question of insolvency: for unless that is satisfactorily made out, the court has no jurisdiction; and when made out, there still resides, and must reside in the chancellor, a discretion as to the ordering of the injunction and the appointment of receivers, to be governed by the facts of the case. It may be that the court will find it proper to restrain a company from carrying on further business, or a bank from issuing notes, and yet leave the directors to settle up its affairs. The court may, at pleasure, grant or reject the prayer in part or in whole. It is necessary that this discretion should be with the court, but at the same time it must not be arbitrarily or unjustly exercised. And if the case come fairly within the provisions of the act, and is one which the legislature intended to provide for, the court is bound to give effect to it, and to enforce its requirements.

1. As to insolvency: Is this company insolvent?

The president has declared the company insolvent, both to Mr. Stimson and Mr. Biggs, and that fifty cents on a dollar was as much as it could pay. There is a mortgage on the property now in process of foreclosure, in favor of Mr. Coster, for twenty-five or twenty-six thousand dollars, and executions in the hands of the sheriff of Passaic county amounting in the whole to a sum exceeding twenty thousand dollars. These executions, ten in number, the sheriff says, were received by him during the last February term of the court, and are remaining unsatisfied in his hands.

These facts show great embarrassment, at all events; but the parties have gone more into detail. The complainant has caused the property of the company to be examined by nine gentlemen residing in Paterson, men of respectability, and said to be good judges. They estimate its value at forty-eight thou-

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and four hundred and eighty-four dollars and fifty-six cents. Several of these persons have been examined, and declare that they made a careful investigation of the matter, and placed a fair value on the property, and that if sold at a forced sale it would not bring exceeding thirty-five thousand dollars. I am well satisfied that property should be judged of at its fair value, and not at the depreciated rate at which a forced sale might bring it.

The defendants have also had the same property examined by two respectable gentlemen, and they estimate it at sixty-nine thousand and twenty-eight dollars. The items of property valued, it will be found, are the same, the difference consisting only in the prices carried out.

The variations in these values are very material. Take, for instance, the value of the lot on which the mill stands, with the water privileges. It is fixed by the complainant's witnesses at fourteen thousand dollars, and by the defendants' at twenty thousand dollars. So with the next item: the building is valued by the complainant's witnesses at ten thousand dollars, and by the defendants' at twelve thousand dollars. The remaining items, with very few exceptions, vary in the same way. With this contradiction in the evidence, and with no personal knowledge of the value of the property, the rule of law would require that I should be governed by the weight of evidence, by which that of nine on the one side, of equal intelligence and respectability, would overbalance the two on the other, without a resort to any invidious distinction between the witnesses. There is one fact, however, disclosed by the evidence of Mr. King, one of the defendant's appraisers, that I cannot shut my eyes against. He says the statement of the property, with the prices carried out just as it now appears, was first made by the president of the company; that they went through the mill with him, and fixed the valuation at the same prices that he had done. This would seem, at all events, to evince great reliance on the judgment of Mr. Wheeler, and really to amount rather to his own estimate, than that of the other men. I mean

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to infer from this that nothing wrong was intended by these appraisers, beyond a falling in or acquiescence with the views of Mr. Wheeler, as to the general estimate of his property. It would seem that the nine appraisers on the part of the complainant made their own estimate, without any guide of this character.

Independent of the property thus valued, the assets of the company are put down at sixteen thousand four hundred and fifteen dollars and ten cents. These several items are canvassed in the evidence, and their real value from that is very small. One item of eight thousand dollars, in J. Carpenter's note, the president considers good, and from a conviction that Mr. Carpenter will succeed in a suit depending in the supreme court of the United States. This suit, it seems, has recently been decided in that court against Mr. Carpenter, and of course the hope on which its recovery is put has failed. A sum of thirteen hundred and twenty-four dollars and forty-four cents, due from the Beaver mill, is abandoned. A claim of five thousand and ninety dollars, against John G. Coster, stands at present with a decision against the company except as to a part, and that a moderate part of that sum. The president himself, also, is placed as a debtor for five hundred and fifty dollars, and he declares himself insolvent. There is scarcely an item on the list of assets, about which a doubt as to recovery does not exist, and it is to me very uncertain, from the evidence, whether any thing beyond a very few thousand dollars, perhaps two or three thousand, will ever be realized to the company from that source.

From this estimate of the property and assets of this company, paying that respect to the evidence which the rules of law require, it would not much exceed in value fifty thousand dollars, and should we even take a medium estimate from the two sets of appraisers, it would not exceed sixty thousand dollars. The debts of the company are stated by the president of the company at sixty thousand dollars, and by an estimate furnished by the company at fifty-nine thousand five hundred and fifteen dollars and fifty cents. To this sum there must be added the

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amount of a mortgage on the property, given by Mr. Wheeler while owner, on which there remains unpaid somewhere about seven thousand dollars. This mortgage is in the hands of the complainant, and I confess there is some embarrassment respecting it; but from all the facts, if I rightly understand the case, it would seem to be a question rather, who was entitled to receive the money, than as to the ultimate liability of the property for its payment. If the company has never paid off this incumbrance, it would be very unsafe in this case to consider it as discharged from all liability, on account of the dispute among the present holders. If it was passed to Mr. Colt for his security, and he passed it again to Mr. Parsons for his indemnity against his notes given on that account, there would seem to be a just claim against the property of the company for one or the other of these persons. If this mortgage is still a valid one, the indebtedness of the company is thereby increased seven thousand dollars. The claim of Mr. Parsons, the complainant, is put down in this estimate at about fifteen hundred dollars; the evidence shows his debt to be larger than this at all events, and he claims a sum rising four thousand dollars.

Forming the best judgment in my power from this whole evidence, with the position of the claims, and the urgency of the demands on the company, by executions hanging over it, and only restrained by the order of this court until this question can be settled, I can come to no other conclusion, than that this company is insolvent, and hopelessly so in its present condition. The whole capital is sunk, and its present property not able to pay the demands against it. It has been in operation since eighteen hundred and thirty-eight, and has, according to the evidence, been carrying on a fair business, but yet no dividends to the stockholders have ever been made, and we now find it in this embarrassed situation. There is one fact to which I should not fail to recur; the company refuse to produce their books of account, though repeatedly called on for that purpose. What those books would show, if exhibited, it is impossible to say, but

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the most unfavorable inference may justly be drawn from withholding them on an investigation of this character.

The last question involves the consideration of the propriety of the court interfering in this case. At the call of a creditor against a company standing as this does, I have no hesitation in coming to the conclusion, that I am imperiously required by a sense of public duty, to interpose by way of injunction, and the appointment of receivers. It would have been grateful to me, could I have come to a different result; but when I look at the organization of the company, at the fact that the whole power is virtually in the hands of one man, that we find a mortgage given on the property, and judgments confessed for large amounts without any order from the board; when I see that the capital is gone, without any dividends ever having been made, and the property remaining unequal to the discharge of the claims against it, with ten executions now in the hands of the sheriff, I cannot say that the complainant has come here without good grounds. Unless I am prepared to declare the law a dead letter, and refuse to give effect to it, there appears to my mind no other alternative than to enforce its provisions in this case. My reluctance to interpose, has been increased by the desire expressed in the petition from several of the creditors and stockholders, that the company might not be enjoined; but from these petitions, it is quite evident they act under (what I believe) a misapprehension of the case, and that is, that the company is solvent. Had the investigation brought me to that result, I should certainly not have interposed, but being satisfied fully on that point, I cannot comply with their request.

The injunction, according to the provisions of the act, must therefore be issued, and receivers appointed.

"This cause being opened to the court by Mr. A. S. Pennington, of counsel with the complainant, at a special court held at Newark, on the fourteenth day of March, in the year of our Lord eighteen hundred and forty-two, and upon reading the proofs and exhibits taken in this cause, and upon hearing the

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arguments of counsel on both sides, the court thereupon took time to consider of the same, and now on this fifth day of April, in the year of our Lord eighteen hundred and forty-two, at a court of chancery held at Trenton, at the stated term of said court, the chancellor being satisfied of the sufficiency of the application made by the said complainant in the said bill, and also of the truth of the facts and allegations therein contained: it is ordered and directed by the chancellor, that a writ of injunction do issue out of, and under the seal of this court, directed to "The Monroe Manufacturing Company," and all and every of its officers and agents, to restrain them, "The Monroe Manufacturing Company," and all and every of their officers and agents, under the penalty of five thousand dollars, to be levied on their and each of their lands, goods and chattels to our use, from exercising any of the privileges or franchises granted by the act incorporating said company, and from collecting or receiving any debt, and from paying out, selling, assigning or transferring any of the estate, moneys, funds, lands, tenements or effects of the said company, until this court shall otherwise order.

"And from the circumstances of this case, the ends of justice requiring it, this court doth appoint George A. Ryerson, Benjamin W. Vandervoort and David Burnett, esquires, receivers, with full power and authority to demand, sue for, collect, receive and take into their possession, all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description belonging to the said company at the date of this order, and to sell, convey, lease or assign all the said real and personal estate, and pay into this court to the account of the said receivers, in some safe place of deposit, to be selected by the said receivers, to the credit of this cause, all moneys and securities for moneys arising from such sales or leases which the said receivers shall collect or receive by virtue of the authority vested in them, to be disposed of by the said receivers from time to time, under the order of this court; that the receiv-

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ers shall first take and subscribe the oath or affirmation directed in and by the act entitled, "An act to prevent frauds by incorporated companies;" and that the said receivers shall be deemed and taken to be receivers for the creditors and stockholders of the said company, with full power and authority, whenever they shall deem it proper, to institute suits at law or in equity, in their names as receivers as aforesaid, for the recovery of any estate, real or personal, debts, rights in action, damages and demands whatsoever and wheresoever existing in favor of the said company at the time of the date of this order, or accruing subsequent thereto; and that the said receivers be also vested with all other powers and authority given and granted in and by the act last mentioned and the supplement thereto, and have liberty to apply to this court as occasion may require; and all other directions concerning the said receivers are to be subject to the future orders of this court."

WILLIAM COUSE V. ALEXANDER BOYLES and EBENEZER
ABER.

Where the vendor agrees to convey a farm "said to contain one hundred and thirty-five acres, be the same more or less," and the deed executed in pursuance of the agreement describes the land by courses and distances, and adds, "containing one hundred and thirty-five acres, be the same more or less," if there proves to be a deficiency of over twenty acres in the quantity of land actually conveyed, the purchaser, upon a bill filed by the vendor for the foreclosure of a mortgage given to secure a part of the purchase money, will be entitled to have an abatement or compensation for the deficiency in the quantity of land.

Under such circumstances the court will not first direct the land to be sold, to ascertain whether it will not, at the reduced quantity, bring the price at which it was sold.

Where land is sold as containing so many acres, more or less, if the quantity on an actual survey and estimation, either overrunning or falling short of the contents named, be small, no compensation should be received by either party: the words "more or less," must be intended to meet such a re-

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said; but if the variance be considerable, the party sustaining the loss should be allowed for it, and this rule should prevail when it arises from mistake only, without fraud or deception.

And it seems that the rule applies although the land is not bought or sold precisely by the acre, the presumption being that in fixing the price regard was had to the quantity.

If the purchaser know the true quantity at the time of his purchase, or these are words used clearly indicating the intention of both parties not to be governed in the sale by the amount of land, the purchaser will not be entitled to relief.

It is not a sufficient objection to allowing an abatement of the price, that the contract has been executed.

If a case be once properly before the court, the court will do all in its power to settle the rights of all the parties in the matter in controversy, justly and equitably by one decree.

The fact that the purchaser lives near the land and sees it daily, can have no bearing on the question, nor can the doctrine of *caveat emptor* have any application. A purchaser has a right to rely upon the vendor for the number of acres, and may place implicit confidence in his statements.

Where the deficiency in the quantity of land sold, is ascertained by the vendor between the execution of the contract of sale and the delivery of the deed, he is bound to make it known to the purchaser; and with a knowledge of the deficiency, to deliver a deed to the purchaser for a greater number of acres than the tract contains, without disclosing the truth respecting it, is a palpable fraud.

Vroom, for complainant.

Dayton, for the defendant.

Cases cited by the complainant's counsel: 2 *Kent's Com.* 380; *Yelverton*, 21; 1 *Sugden on Ven.* 382 383; 6 *John. Chan.* 233; 2 *Freeman*, 106; 6 *Vesey*, 678; 5 *Vesey*, 508; 6 *Binney*, 102; 13 *Price*, 749; 1 *Sugden*, 562.

Cases cited by defendant's counsel: *Halst. Dig.* 146; 1 *Peters*, 49; 1 *Sugden on Ven.* 320, 301, 309, 319; 1 *Caines*, 493; 2 *John. R.* 37; 17 *Vesey*, 395; 16 *Vesey*, 1; 9 *John. R.* 450, 464; 10 *Vesey*, 293, 315; 1 *Vesey*, 218 221; 2 *Brown's*

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C. R. 118; 2 *Hen. and Mun.* 173; 17 *Vesey*, 274, 279; 1 *Sugden on Ven.* 322, 321, 307; *Cooper's Eq.* 308; 1 *John. Chan.* 213 218; 2 *John. Chan.* 521, 522; 1 *Serg. and Rawle*, 166; 1 *Vesey and B.* 375; 2 *Hen. and Mun.* 164; 1 *Day*, 256; *Powell on Con.* 147; 1 *Sugden on Ven.* 563; 2 *Brown's C. R.* 119.

THE CHANCELLOR. This is a bill for the foreclosure of a mortgage given by the defendant, Boyles, to the complainant. The making of the mortgage is admitted, but it is alleged that it was given for a part of the consideration money, on a farm purchased of the complainant, which, upon a survey and estimate of the land, falls short of the number of acres for which it was sold; and the defendant claims an abatement for such deficiency.

The article of agreement on which the sale took place, was dated the first of November, eighteen hundred and thirty-seven, and by it, the complainant and one Jane Negus, who were the owners of the property, agreed, for the consideration of five thousand and five hundred dollars, to convey to the defendant, Boyles, on or before the first of April thereafter, a farm on which the parties then resided, in the township of Newton, in the county of Sussex, "said to contain one hundred and thirty-five acres, be the same more or less." The deed was made out for the property and bears date the twenty-ninth of March, eighteen hundred and thirty-eight, but was not delivered until the fifth of November, eighteen hundred and thirty-eight, at which time the defendant, Boyles, accepted the deed and went into possession. Two thousand dollars was paid or otherwise satisfactorily arranged with the complainant, and the balance, being three thousand and five hundred dollars, was secured by the mortgage on which this suit is brought, upon the property purchased. The deed has a full description of the premises by courses and distances, and as to quantity of land, uses this language; "containing, after excepting out of the foregoing survey, a certain lot of thirty-seven hundredths of an acre, used for the pur-

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poses of a grave-yard, and heretofore conveyed for that purpose, one hundred and thirty-five acres, be the same more or less."

By the evidence of Charles Rhodes, a surveyor, it seems the complainant, on the day of the date of the deed, employed him to run out the land, which he did, and drew the deed from his survey. At this time the surveyor did not make a calculation of the quantity of land in the survey, but told the complainant he did not think it would hold out. The complainant directed him to put in the quantity at one hundred and thirty-five acres, but desired him to make a calculation for his satisfaction. This he did in June following, which was before the deed was delivered, and found it to contain but one hundred acres and eighty-five hundredths. He informed complainant how his estimate turned out, who said, he must have made a mistake; he said he thought not, as he had been over it twice. The surveyor then went over the calculation a third time, and told the complainant there was no mistake in it, and when he so informed complainant, he desired him to say nothing about it. The complainant has, since the delivery of the deed, caused the land to be run out by Grant Fitch, and a calculation of the quantity to be made by him, and the result is, that he makes it to contain one hundred and twelve acres and forty-three hundredths. Thus it seems, by the estimate of Mr. Rhodes, there is a deficiency of rising thirty-four acres, and by that of Mr. Fitch, of rising twenty-two acres.

Two questions are made upon these facts; whether the defendant, Boyles, under this contract and deed, is entitled to have any abatement or compensation for the deficiency in the quantity of the land; and if so, whether he can have it in this action.

Upon the first question, it is quite evident it was in the contemplation of these parties at the time, that the quantity of land sold was one hundred and thirty-five acres; both the contract and the deed call for that number of acres, and it is reasonable to suppose that before the survey of Mr. Rhodes, they

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thought that very near, if not exactly, the amount of land. The books are full of cases on this subject, for it is a difficulty that has often arisen and created much discussion. It is evident, too, that different views have been taken of it in different courts. The plain and sensible rule, as it appears to me, is this; when land is sold as containing so many acres "more or less," if the quantity on an actual survey and estimation, either overrunning or falling short of the contents named be small, no compensation should be recovered by either party. The words more or less, must be intended to meet such a result. But if the variance be considerable, the party sustaining the loss should be allowed for it. And this rule should prevail where it arises from mistake only, without fraud or deception. The case of *Hill v. Buckley*, 17 *Vesey*, 401, decided by sir William Grant, master of the rolls, is very much in point, and settles the question in a satisfactory manner. That was a bill for a specific performance; the quantity of land was represented to be two hundred and seventeen acres and ten perches. It turned out to be about twenty-six acres less, and the party had an abatement *pro tanto*. In this case too, there was no evidence of any intended deception; and the rule is stated to apply generally, although the land is not bought or sold professedly by the acre; the presumption being, that in fixing the price, regard was had to the quantity. If the purchaser know the true quantity at the time of his purchase, or there are words used clearly indicating the intention of both parties not to be governed in the sale by the amount of land, the purchaser will not be entitled to any relief. I refer upon this subject to 6 *Vesey, jun.* 328; 1 *Vesey and Beames*, 377; and to *Sugden on Vendors*, 218, and the note containing a reference to the American cases. Nor do I think it a sufficient objection to allowing an abatement of the price, that the contract has been executed. It is true, the cases cited refer to contracts remaining *in fieri*, but the principle is the same whether the contract only be executed or has been consummated by giving the deed; the injury is the same which the party sustains in the one case as the other; the mode of redress, and in-

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deed the power of the court over the case, may be very different. Whether a court of equity will entertain jurisdiction for the sole purpose of giving compensation or damages to a complainant, for any deficiency in the quantity of land conveyed, after a conveyance actually made, is a very different question from making such allowance to a party who comes into court and asks a specific performance of an unexecuted agreement. If the case be once properly before the court, it will do all in its power to settle the rights of all the parties in the matter in controversy, justly and equitably, by one decree.

Under this agreement and deed, therefore, I deem the defendant equitably entitled to an abatement for the deficiency in the number of acres, upon the supposition that it was a mistake only, and without knowledge to the contrary by either of the parties, at the time of the contract. It cannot be supposed that it was believed by either party that the deficiency, as shown by either surveyor, was so large, or it would have affected the terms of the contract. The defendant, by his answer, distinctly declares he never would have paid the price he did, had he known the true quantity of land. The variance is too large to be passed by; taking a medium quantity between the two estimates, and it will leave a deficiency of nearly thirty acres on the purchase of one hundred and thirty-five acres. The fact that Mr. Boyles lived a neighbor and saw the land daily, can have no bearing on the question, nor can the doctrine of *caveat emptor* have any application. A purchaser relies, and has a right to rely upon the vendor for the number of acres, and may and usually does place implicit confidence in his statements.

But there is a farther view of this case, which places the defendant's equity on a still firmer ground. While it is manifest that he was ignorant, except from the complainant's representations, of the quantity of land in the farm, the evidence shows that before the bargain was consummated by the delivery of the deed, the complainant knew all about it; his own surveyor, after going over the calculation three times, told him how much

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land there was, and the complainant desired him to say nothing about it. There are several other occasions stated in the evidence, of complainant's referring to this subject, and desiring that it might not be mentioned, and even boasting that Boyles had not got the land as cheap as people thought, on account of its falling short in the quantity. He even went so far as to excuse himself for not having mentioned it to the defendant at the time of the sale, because he wished to get a Mr. Aber in as security for the money, who was rich and could stand it. When this deficiency was discovered by the complainant, he was bound upon every principle of common justice to make it known to the defendant; and to go forward with the knowledge he then possessed, with a deed for one hundred and thirty-five acres and present it to the defendant, keeping him in the dark respecting it, was a palpable fraud.

Upon the remaining question, as to the power of the court, in granting this abatement to the defendant in the present action, I can see no serious difficulty. In a variety of cases, upon a bill for a specific performance, the court have directed a reference to a master to make the deduction, and why cannot the same course be adopted here? In the case of *Coster v. The Monroe Manufacturing Company*, in this court, on a bill to foreclose a mortgage, where it appeared that the defendant had been ejected at law from a part of the premises covered by the mortgage, and for which purchase the mortgage had been given; to prevent circuity of actions, a reference to a master was made to ascertain the damages sustained by the defendant, by the title so proving defective to a part of the lands, with a view of deducting it from the amount claimed by the complainant on his mortgage. This case is, in my view of it, still easier to be reached, and fully within the power of the court. It is suggested by the complainant's counsel, that if the court grant any relief, it should be by first directing the farm to be sold and see whether it will not, even at the reduced quantity, bring the price at which it was sold to Boyles. There would be mani-

* Ante, vol. i. page 467.

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est injustice in this course; prices of land may have varied very much, the defendant may have improved the farm, and besides he is entitled to have the land. Chief justice Spencer, sitting in the court of appeals, in 9 *John. Rep.* 465, takes an important distinction between the case of a vendor and that of a vendee, coming into equity for a specific performance. If the vendor cannot perform the contract entire, the vendee will not be compelled in equity to perform it *pro tanto*, but the vendee, if he cannot obtain the whole, will be entitled, if he desires it, to a performance of the contract for so much as the vendor may be able to give. If, therefore, the complainant could not convey the whole number of acres, the defendant, on this principle, is entitled to have a conveyance for as much as he is able to convey. I will not say, that cases may not arise in which it might be proper to rescind the entire contract, but this does not strike me as one, if such a question was properly under consideration, and more especially, as it appears the defendant upon learning the true situation of things, offered the complainant to rescind the entire contract, which he refused to do, and I now think he has waived any right which he might otherwise have had to the adoption of that course.

Let the case be referred to a master, to ascertain and report the amount due the complainant on his bond and mortgage, and to become due thereon, after making to the defendant, Boyles, a rateable abatement in the price of the land between one hundred and thirty-five acres, and the number of acres actually covered by the survey;* the true number of acres to be ascertained by the master, from the evidence already taken in the cause, and by causing such further survey and estimate to be made, as may be necessary to a safe result; and that he take the evidence of such further survey and estimate and return it with his report. Also, that he further report the amount due on the defendant Aber's mortgage, and to become due thereon; and whether the property be so circumstanced as that a sale of part can be made, to satisfy the amount due, without prejudice, &c.

* See letter.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY,

JULY TERM, 1842.

AMOS SEVERNS v. The EXECUTORS of JOHN WOOLSTON
deceased, and ISAAC HILLIARD, Sheriff of the County of
Burlington.

A court of equity will, by injunction, restrain a mortgagee from proceeding
at law to sell the equity of redemption, in satisfaction of the mortgage
debt.

THE bill states that the complainant, being indebted unto
John Woolston in his life time in the sum of two thousand five
hundred dollars, on the thirty-first of December, eighteen hun-
dred and thirty-five, executed to the said John Woolston a bond
with warrant of attorney to confess judgment, in the penal sum
of five thousand dollars, conditioned for the payment of the said
sum of two thousand five hundred dollars in one year from the
date thereof, with interest; and in order further to secure the
payment of the said debt, he, together with his wife, executed
to the said John Woolston a mortgage, bearing even date with
the said bond, upon lands situate in the township of Chester
and county of Burlington, whereof the complainant was seized
in fee; which said mortgage was duly acknowledged and recor-
ded. That the complainant is still in possession of the said mor-

[*Severns v. Woolston's Ex'rs.*]

gaged premises, and that he has paid the interest on the said bond up to the thirty-first day of December, eighteen hundred and forty, but that the interest since accrued thereon, together with the whole of the principal, still remains due and unpaid.

That on the twenty-fourth day of May, eighteen hundred and forty-two, the said John Woolston having died, his executors caused judgment to be entered in the court of common pleas of the county of Burlington, against the complainant, upon the said bond, by virtue of the warrant of attorney thereunto annexed, and caused an execution to be issued thereon against the goods and chattels, lands and tenements of the complainant; which said writ was delivered to Isaac Hilliard, esquire, sheriff of the said county of Burlington, to be executed. That the said sheriff, under color of the said writ of execution, has levied upon the said mortgaged premises, and advertised the same to be sold.

The prayer of the bill is, that the defendants may be restrained by injunction from making sale of the said mortgaged premises, or any part thereof, by virtue of the said writ of execution.

Moffett, for complainant, now moved for an injunction, pursuant to the prayer of the bill, and cited *Tice v. Annin*, 2 *John. Chan.* 125.

THE CHANCELLOR. Let an injunction be issued, pursuant to the prayer of the bill.

Order accordingly.

THE RECEIVERS OF THE MORRIS CANAL AND BANKING COMPANY V. EDWARD R. BIDDLE, THE STATE OF INDIANA, et al.

A motion to dissolve an injunction for want of equity in the bill, will be heard before answer filed.*

Where the object of the bill will be answered, a sheriff's sale should not be restrained by injunction, but the sale should be suffered to proceed, and the money stayed in the sheriff's hands.

The sheriff remains liable for property in his hands by virtue of an execution, notwithstanding he is restrained by injunction from proceeding to a sale.

Where an injunction is granted *ex parte*, the court will at any time hear a motion to dissolve for want of equity, unless for special cause.

IN this case, a bill was filed on the thirteenth of June, eighteen hundred and forty-two, for an injunction to restrain the sale of certain real estate, levied on by the sheriff of the county of Sussex, as the property of the Stanhope Iron Company, by virtue of an execution issued out of the supreme court of this state, at the suit of the State of Indiana.

The charges of the bill were, that the property levied upon by virtue of the said execution, was, in equity, the property of the receivers, and that the judgment upon which the execution issued, was procured by collusion, and was fraudulent and void. The bill sought not only to restrain the sale, but to avoid the judgment and execution, and to cause the bond upon which the judgment was entered, to be delivered up to the receivers, to be cancelled.

Upon filing the bill an injunction was allowed and issued.

B. Williamson, for the State of Indiana, now moved to dissolve the injunction, upon notice, without answer, for want of equity in the bill.

E. Vanarsdale, for complainants, objected to the hearing coming on. He insisted that the motion to dissolve an injunction

* See ante, vol. i. page 409, note.

[Receivers of Morris Canal and Banking Co. v. Biddle et al.]

tion could not be entertained before answer filed, and cited *Rules*, IX. s. 2.

Williamson, contra, insisted that the hearing should proceed. The sheriff, he contended, ought not to have been restrained from making sale. The property was thereby exposed to waste, and the plaintiff in execution to unavoidable loss. The proper course would have been, to allow the sale to be made, and to stay the proceeds of the sale in the sheriff's hands, subject to the order of the court: *Hawkshaw v. Parkins*, 2 *Swans*. 549.

In support of his right to be heard upon the motion to dissolve the injunction before answer, he cited *Drewry on Inj.* 371; *Vipan v. Mortlock*, 2 *Mer.* 479; *Roper v. Williams*, 1 *Turn.* and *Russ.* 18; 1 *Newland's Ch. Pr.* 236.

THE CHANCELLOR. Where the motion is to dissolve the injunction for want of equity in the bill, the rule requiring an answer clearly does not apply; it is only when the motion is to be sustained by affidavits, or other matter is relied on, independent of the bill.

Where the object of the bill will be answered, the sale should be suffered to proceed, and the money should be staid in the sheriff's hands. That course, however, would not meet the object of the present bill.

The sheriff remains liable for the property in his hands, notwithstanding the injunction: he is bound to take charge of it. If any part of the property levied on has gone into the hands of the receivers, they should compensate the sheriff.

I am clearly of opinion, that where an injunction is granted ex parte, and notice is given of a motion to dissolve the injunction for want of equity in the bill, I must hear the motion, except for special cause, as for the illness of counsel. The motion should not be delayed, merely because the party or his counsel is not ready for the argument; the court must hear the motion at any time.

The argument must proceed, unless counsel otherwise agree.

NATHANIEL S. WIKOFF, Administrator, &c. of WILLIAM WIKOFF, v. CATHARINE DAVIS, WALTER W. HART, and others.

If the mortgagor sells the land covered by the mortgage in different parcels and at different times, that portion of the land last sold must first be applied in discharge of the mortgage debt, and if that be not sufficient, then the other portions in the inverse order of the sales.

And the same principle applies though the sales in parcels were made not by the mortgagor, but by a person claiming title under him.

The rule will not interfere with a special agreement, and if one of the purchasers agree to pay off the whole incumbrance, the contract will be enforced.

Hartshorne, for complainant.

Dayton, for W. W. Hart.

Ryall and Vredenburg, for Perrine and Davis.

Vroom, for Hartshorne and Patterson.

THE CHANCELLOR. William Davis and Catharine his wife, on the seventh of August, in the year eighteen hundred and fifteen, made and executed a mortgage to William Wikoff and Elias Conover, to secure the payment of a bond for four thousand six hundred and sixty-six dollars and sixty-six cents, in two equal payments, at a short date after its execution. Elias Conover, one of the mortgagees, died first; afterwards William Wikoff, the remaining mortgagee, died, intestate, and the complainant has filed his bill as the administrator of William Wikoff, the surviving mortgagee, to foreclose the mortgage, and for a sale of the lands therein mentioned. William Davis, the mortgagor, also died intestate, and his administrators, under an order of the orphans' court, sold the mortgaged premises at public sale, on the sixth of September, eighteen hundred and twenty-eight, to Dr. John T. Woodhull, of the county of Monmouth.

[Wikoff v. Davis et al.]

Woodhull became the purchaser, subject to the incumbrance created by the complainant's mortgage, and with the understanding that he should pay it off. After his purchase, he conveyed the property in parcels to the following persons, and at the same times, and received from all the purchasers the full consideration for the parts so sold to them, they trusting that he would pay off and remove the existing incumbrance without bringing them to any difficulty.

Sold on the twentieth of October, eighteen hundred and one, to Walter W. Hart, forty-eight acres and fifty hundredths; on the twenty-sixth of September, eighteen hundred and twenty-two, to Samuel Perrine, the main portion of the farm, with certain reservations to the grantor; on the fifth of October, eighteen hundred and thirty-two, to William D. Davis and

Davis, a part of the land so reserved, consisting of seven acres and thirty-eight hundredths of cleared land; on the thirteenth of May, eighteen hundred and thirty-five, to different persons, in distinct lots, the balance of the mortgage premises so reserved as aforesaid, consisting of wood land: these are now owned by William Hartshorne and Stephen

Wikoff. The complainant's mortgage is not disputed, except as to the amount due upon it, nor is it denied that it constitutes a lien, and may resort to all the property covered by it for payment. The only question is, as to the order in which the property must

Walter W. Hart, the first purchaser, insists upon the right that the portion first sold shall be the last resorted to for satisfaction of the mortgage. Perrine and Davis insist upon the right of the first mortgagee, but frankly admit that their respective deeds, though made at different times, were executed and delivered at the same time, and should be bound to bear a rateable proportion towards satisfying the mortgage, after exhausting the wood lot held by Perrine and Patterson. Hartshorne and Patterson insist, under the circumstances of this case, that all the property should be resorted to towards paying off the mortgage, according to the several shares. While the complainant stands in-

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different as to the order of sale, being entitled to his money from all the lands embraced in the mortgage.

Every question raised in this case will be found settled in this court, as I think, in the case of *Shannon v. Marselis and others, Saxton*, 413. By that case it is declared, that if a mortgagor sell the land covered by the mortgage, in different parcels, and at different times, that portion of the land last sold must first be applied in discharge of the mortgage. If the land last sold will not pay off the incumbrance, then that portion sold next preceding it must be disposed of, and so on, reversing the order in which the mortgagor conveyed the property. This is the undeniable rule on all sales made directly by the mortgagor. But this case, if I understand it aright, goes farther, and decides more. One of the parcels sold by the mortgagor, had been again sold by the purchaser in parcels to different persons, and at different times; and it was held that among these there were equities, and that that portion should be sold first which was the last conveyed.

The distinction set up in the present case is, that the sale of the land into parcels was not made by Davis, the mortgagor, but by Woodhull, who became the purchaser of the whole farm, at the administrators' sale. This difference is supposed to consist in this, that in the one case the mortgagor is personally liable for the debt to the mortgagee, and not in the other. Chancellor Williamson, in the case of the *Executors of Clymer v. James and others*, does indeed express a doubt as to carrying the principle farther than to sales made by the mortgagor, but it is a mere suggestion at the close of a long opinion on other matters, without any case cited to support it, and he does not profess to have made up any opinion on that point himself, but reserves it for consideration, whenever the case comes up for final decree. That case was referred to James S. Green, esquire, as master, who reported that the land ought to be sold on the principles established in the case from *Saxton*, 413, before referred to, and the chancellor, (Seeley,) decreed in conformity with the master's report. What chancellor Williamson would

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have done, had the case been finally decided by him, it is impossible to say, but the decree as made, did not carry out his suggestion, and was acquiesced in, as I learn, without an appeal being taken. In New-York, the subject has been repeatedly considered by different chancellors, and without any such distinction being acknowledged: 1 *John. Ch.* 447; 5 *John. Ch.* 241; 2 *Paige*, 300. In the last case, chancellor Walworth uses this comprehensive language: "Where lands, belonging to several persons, are covered by a mortgage given by the person from whom they all derive their titles, the lands last sold by him are first liable to satisfy the incumbrance, and the several parcels must be sold by the master in the inverse order of their alienation." No difference is here taken, whether the owners derive title directly from the mortgagor or not, nor have I been furnished with any decision that does. All these cases must, of course, refer only to such purchasers as buy on the same terms; for if it appear that one bought with the promise to pay off the whole incumbrance, and another without any such understanding, a court of equity would enforce so plain an agreement. I confess I do not perceive the force of the reason upon which the distinction is taken, between a sale made directly by the mortgagor, or by a purchaser from the mortgagor. It is not only because the mortgagor is personally liable for the money, that the rule is adopted, but because the property is bound as security for the debt, and in case a part is sold, the residue remaining in the hands of the mortgagor should first be applied. Had Dr. Woodhull never sold any part of this farm, except the forty-eight acres to Hart, should not the residue still belonging to him have been first applied to pay off the mortgage? He had purchased, subject to the mortgage, and promised to pay it off, and then sold to Hart and received his full consideration. If this be so, then upon what principle can the rights of Hart be affected by any future disposition of the property made by Dr. Woodhull? Neither case can be viewed in the light of a rent charge, growing out of the land itself. The debt in either case is a personal obligation on the part of the debtor, and the charge on

[Wikoff v. Davis et al.]

the land is only as a security for the debt. But if the proposition be true, that the personal liability of the mortgagor to pay the debt, makes a difference, the objection should not prevail in this case, for Dr. Woodhull was actually bound to pay this debt: he purchased the farm subject to it, and promised to discharge the incumbrance.

I am therefore of opinion, that the rule as settled in this court, must obtain in the present case, and that the portion of the farm now owned by Hartshorne and Patterson must first be sold, the part conveyed to Perrine and the Davises under their answers must next be sold, and the portion conveyed to Hart must be sold last.

There is one other question made in this case, touching certain payments alleged to have been made on the mortgage, by Mr. Woodhull; this would more properly have come up on the master's report, and in fact the whole case would have been better presented at the coming in of his report. I think Dr. Woodhull a competent witness in respect to his payments, for as to some of the defendants, by whom he is offered, he has been fully released, and he is so involved in the whole proceeding as to be balanced in his interest. If the payment be applied to this mortgage, he is liable for so much more on his own obligation in the hands of the complainant, and whether applied to the one or the other, it can make no difference to him. The six hundred dollars is fully shown by him to have been paid on this mortgage, and must, I think, be a credit to that amount. As to the other credits claimed, I do not think, from his evidence, they ever were so applied. I leave the question open, as I should, to the master, to take the account in his discretion, directing him to use the deposition of Dr. Woodhull as a competent witness in the cause.

When the master makes his report, if any of the parties see ground for excepting to it, they will be at liberty to do so; and if upon drawing up the final decree, there shall be any embarrassment in its detail to meet the views here expressed, it will be then settled.

Reference to a master.

SAMUEL LANING V. ISAAC COLE.

Where one party signs an agreement to do certain acts, after the other shall have performed on his part conditions which are precedent—the conditions being performed, equity will decree a specific performance against the party who signed the agreement.

There is *mutuality* in the terms of such an agreement.

Where one party only is bound by the contract, and nothing has been done under it, will equity decree a specific performance?—*Quere.*

BILL for the specific performance of a contract, in the terms following :—

"Agreement between Isaac Cole, of the city of Camden, and state of New-Jersey, and Samuel Laning, of the said city and state, dated this twenty-eighth day of November, eighteen hundred and thirty-nine, witnesseth as follows, to wit :

"1. The said Isaac Cole agrees that the said Samuel Laning shall have six months from the twenty-sixth day of October last, to raise the amount of the purchase money which the said Isaac Cole paid for the property called Laning's Row, and the costs and expenses incident to said purchase, together with interest at six per cent. ; and upon the payment of the said purchase money, interest and expenses, the said Isaac Cole covenants to reconvey the said premises to the said Samuel Laning; provided always that the said Samuel Laning shall raise the said sum of money upon mortgage of and upon the said premises, for the term of five years, and for his own and sole benefit; and the said reconveyance shall not be for the benefit or advantage of any other person than the said Samuel Laning.

"2. This agreement is upon the further condition, that the said Isaac Cole shall have from the date hereof the sole and exclusive possession of the said premises, and shall receive the rent therefor to his own use; and upon the repayment of the said purchase money, interest and expenses, as aforesaid, the said Isaac Cole shall account for the rents of the said premises, after deducting repairs.

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"In witness whereof, the said Isaac Cole hath hereu
his hand and seal, the day and year first above written.

"ISAAC COLE. [L

"Sealed and delivered in the }
presence of W. N. J." }

Various points are involved in the charges of the complainant's bill, and the defendant's answer, which are not new to an understanding of the case. The matters relied upon for defence are stated in the chancellor's opinion. The cause heard upon bill, answer, replication and proofs.

Hamilton and Wall, for complainant.

Jeffers, for defendant.

THE CHANCELLOR. The property involved in this suit consists of a lot of land in Camden, upon which there are six houses. The complainant was formerly the owner of the lot and built the houses to let, but becoming embarrassed, they were sold by the sheriff of Gloucester to the defendant, on the sixth of October, eighteen hundred and thirty-nine, on conditions at law, (subject to incumbrances,) for three thousand six hundred and sixty dollars. Whether any valid objection existed to the sale or not, is not now to be settled, but the complainant felt himself aggrieved by it, and being in possession, the defendant was the purchaser, on the twenty-eighth of November after the sale, agreed by writing, under his hand and seal to reconvey the property to him, upon being repaid his purchase money with interest and expenses, within six months from the time of the sale, provided the complainant raised the money upon mortgage upon the premises for the term of five years; the reconveyance was so made as to enure to the benefit of the complainant alone and not other persons. There was a further condition, that the defendant should have immediate possession of the premises, and receive the rent to his own use, but in case of repayment by the complainant, as contemplated

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the defendant was to account for the rents and profits, after deducting repairs. This agreement was made in a spirit of liberality and good feeling to the complainant, who is represented as an aged man, and unfortunate in business. It was designed, no doubt, to benefit him alone, and not his creditors or any other person. The bill is filed for a specific performance of this agreement, and we are to see whether any good reason is urged against its being fulfilled.

Before the time for the redemption, as fixed by the agreement, arrived, judge Rogers, with other friends of the complainant, determined to assist him, and the other persons failing to aid in the matter, the judge agreed to do it himself. He accordingly raised the money at the Camden bank, and made several efforts to get the defendant to convey the property for the complainant's benefit, but he failed in all. Mr. Wells, finally, acting in behalf of judge Rogers, who had become infirm, put the question, as he says, direct to the defendant, to know whether he intended to do any thing in the business, and he signified to him that he did not. Here the matter ended. No question is made on the tender of the money; the defendant agreed to make no objections on that score. It was a certified check for three thousand dollars, acknowledged on all hands to be good, and the amount, after deducting the rents of the property, must, I think, have been sufficient.

But it is said by the defendant's counsel, that there is no mutuality in this agreement; the paper was signed by the defendant alone, and therefore no specific performance can be decreed. The cases are far from being uniform on this subject. Chancellor Kent, in 1 *John. Chan.* 373, does indeed state it to be his opinion, that a specific performance cannot be sustained, when one party only is bound by the agreement; and yet in 7 *Vesey*, 265, and 9 *Vesey*, 351, as he states himself, a contrary doctrine prevailed. The case in 11 *Vesey*, 592, does not, in my view, overrule these decisions, but says, that lord Redesdale has intimated a doubt whether the court would perform a contract signed by one party, the other not having signed it, and nothing

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having been done upon it. This is also the purport of the decision in 1 *Schoales and Lefroy*, 13. It must be remarked, that chancellor Kent does not decide the case in 1 *John. Chan.* 373, on this point. The view I take of the present case, renders it unnecessary to settle the question how far the court will interfere, when one party only is bound and nothing has been done under the agreement, for here was an express condition, that the complainant should deliver the possession of the property to the defendant, and put him in receipt of the rents. This was done, and the rents have actually been received by the defendant, and he cannot now say, after a performance by the complainant, that there was no mutuality. The complainant did not, indeed, sign the paper, and it was never intended that he should, but the papers contained conditions on his part, which the evidence shows he faithfully performed. The case is this; a party signs an agreement to do certain things, after the other shall have performed on his part conditions which are precedent; these conditions being performed, upon requiring the party who signed the agreement to fulfill on his part, he says, I am not bound, because you never signed the agreement. I can see no propriety in such a view of the case. There was a mutuality in the very terms of the agreement, and in the language of the cases, something has been done under it, and there is no doubt it had the effect, beside, to quiet all question as to the sheriff's sale.

As little justice do I perceive in the remaining ground taken by the defendant's counsel, that the money was not raised by mortgage for five years on the property. This was virtually so done; judge Rogers bound himself to the complainant, that he should have the power, at any time within five years, to redeem the property; he proposed to take a deed with this qualification. Indeed, it would seem the parties were willing to take the deed in any way that could enable the complainant, at any time within five years, to regain his property, for his own benefit. This was within the spirit of the defendant's agreement. There is nothing in the case that shows the interference of judge Ro-

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gers to have proceeded on any selfish ground. He came forward and designed to befriend the complainant by lending him this money, with power to repay it and take the property within five years. But the defendant declined to do any thing about it, which caused this bill to be filed.

Upon the complainant thus tendering the defendant his money, he was bound to make out and deliver him a deed for the property, and failing to do so, the complainant was entitled to come here for the aid of the court. It is true that the defendant cannot be required to vary his agreement, but he must carry it out in its true spirit and meaning. The deed can only be required to be made to Mr. Lanig, the complainant, for such is the defendant's agreement, and that too upon the complainant having a loan of the money for five years from the time the money was tendered by judge Rogers. There was, indeed, from the evidence, some ambiguity in the negotiations between the defendant and judge Rogers, and his friend Mr. Wells; but looking at the substance of what then passed, and the motives which evidently actuated judge Rogers, there is enough to induce me to think the complainant did sufficient to entitle him, at the hands of the defendant, to be restored to the title of his property.

There must be a reference to a master, to ascertain the amount paid by the defendant for the property, with interest and expenses; also, the amount received by him for rents and profits, after deducting repairs. The question as to costs and further equity, reserved.

Order accordingly.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY.

OCTOBER TERM, 1842.

SAMUEL SHIELDS v. JOHN ARNDT.

The jurisdiction of a court of equity in cases of waste and nuisance, is of a preventive character, and comes in aid of the courts of law. It is founded on the necessity created by irreparable mischief, and the inadequacy of pecuniary compensation.

The diversion of a water-course from its accustomed channel, is a nuisance which, before the nuisance is created, may and should be restrained by injunction. No mere pecuniary compensation will answer the ends of justice.

The mere denial of the complainant's right by the defendant, in his answer, will not oust this court of its jurisdiction to interfere by injunction.

.. In cases of doubt, the right should usually be established at law, before the granting of an injunction.

A long enjoyment of a right, will entitle the party to an injunction to restrain a private nuisance, even though the defendant may deny the right; and the court will exercise its discretion whether to order a trial at law or not, before granting an injunction—always inclining, if there be reasonable doubt, to put the case to a jury.

Any particular use of water, or diversion from its accustomed channel for twenty years, undisturbed and uninterrupted, will raise the presumption of a grant.

It seems, too, that as twenty years' possession will give a right, so a nonuser for the like term will put an end to it.

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Constitute a water-course, there must be a stream *usually* flowing in a particular direction, though it need not flow continually.

ollow or ravine, through which water flows only in times of rain or the melting of snow, is not, in legal contemplation, a water-course.

a party unlawfully turns a stream of water upon the land of an adjoining proprietor, no right to the water is thereby conferred, and the wrong-doer may divert the water again at any time within twenty years.

e diversion of a stream of water, or any part of it, by a complainant, after he allowance of a writ of injunction in his favor, and before the service of the writ, is an abuse of the process of the court.

is disallowed to a successful party, on the grounds that his own unlawful act led to the controversy, and that great and unnecessary expense was occasioned by the examination of numerous witnesses.

THE complainant filed his bill of complaint in this cause against the defendant, on the twenty-first of May, eighteen hundred and thirty-nine, to enjoin him from diverting an ancient water-course, which was used and accustomed to flow, in a natural channel, upon the lands of the complainant, contiguous to those of the defendant, about seventy yards along their respective line of lands, and thence to reflow upon the lands of the defendant.

The bill states that the parties reside in Mansfield, Warren county, upon adjacent farms. That at the time of the purchase of the defendant's farm, some years since, there was, and still is, a certain ancient water-course crossing the said farm nearly at right angles at the Spruce Run turnpike road, and always accustomed to flow in a south-western direction entirely across and over the said farm, and in and upon the lands next adjacent, being the complainant's, lying south thereof. That the said ancient water-course was always used and accustomed to flow in its natural channel, by its circuitous route, in and upon the said lands of the complainant, an easterly course, a distance of about seventy yards, to a certain other point in the line of the defendant's lands, whence it reflowed in and upon the defendant's lands, and so continued and flowed, and passed off into the Musconetcong river.

That the complainant had formerly owned and occupied an-

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other farm, about half a mile south of the said defendant's farm, which being destitute of water, proved a great inconvenience and loss to the complainant. That in the spring of eighteen hundred and thirty-five, complainant, jointly with one John Strader, jun., purchased the premises adjacent to the farm of the defendant, and known as the Creveling farm, containing about one hundred and twenty-two acres, and lying immediately adjacent, the whole length thereof, from north-east to south-west, and valuable for agriculture and pasturage, and that in October of the same year, the complainant became the sole proprietor of the said farm.

That, having experienced the great inconvenience of cultivating lands destitute of springs and natural water-courses, he was the more anxious to own and occupy the farm in question, chiefly on account of the natural water-course, at that time in full, free, undiminished and uninterrupted flow in and upon that portion thereof above described; and the better to enjoy those advantages, he purchased other tracts of land to enlarge his said farm the following year—one lot of fifteen acres, and another containing fifty-nine acres; and in the spring of that year, eighteen hundred and thirty-six, the complainant moved with his family upon, and occupied the said farm and premises, then containing about one hundred and ninety-four acres of land, and there continued until the time of filing his bill of complaint.

That he repaired the mansion, erected a large and commodious barn, wagon-house, and other suitable out-buildings, at considerable cost, and put up long lines of board fences, and others of posts and rails, and laid out his said premises in separate fields, connecting the whole by lanes and fenced avenues, leading directly to the said water-course, herein above described, flowing in its natural and accustomed channel, in a circuitous course, about seventy yards, in and upon a certain portion of the said premises, for the needful accommodation and sustenance of the horses and cattle of the complainant, upon his premises, as a watering place.

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That the same is an ancient water-course, and used to flow as designated above, in its old accustomed channel, descending from the mountains, beyond the memory of man, except only a short time disappearing in a sink-hole. That, by reason of ditching along the line of the ancient stream, and the natural flow of waters from its immediate vicinity, the said ancient natural water-course revived and increased, and hath, as ever before, continued to flow on in its ancient, natural and accustomed channel. That its use is wholly indispensable and invaluable to complainant, to be deprived of which, will inevitably impoverish his said farm, subject him to great loss and inconvenience, and render the said plantation comparatively worthless, and all his recent expenditures of accommodation and improvement an idle waste of time and money.

The bill further charges, that the defendant, aware of these premises, and greatly envying the progressive improvement of the complainant's farm, did, for sheer malice, and without any motive of personal advantage or interest, but solely to vex, harass, and injure the complainant in mind and estate, and impede his progress in husbandry, about two years since, cut a ditch about four feet wide at top, and three feet at bottom, and eighteen inches deep, in a straight line along the partition line fence between them, about three feet distant, where the soil was firm and unbroken, a distance of about fifty yards, and nearly parallel with that portion of the said ancient water-course lying upon the complainant's premises immediately adjacent, designated as his watering place aforesaid, and in such position at the extremities of this said ditch that a few hours' labor or an ordinary freshet, would naturally connect the same with the natural course of the said stream and ancient water-course, and thus turn the same wholly upon the lands of defendant, and dry up the complainant's said watering place. That, early in the spring of eighteen hundred and thirty-nine, the freshets broke away the ground at the end of said ditch, and that the water from his said watering place was running into the ditch formed by the defendant; that the complainant thereupon re-

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quested defendant to go down the line of lands with him; he did so, and while there, at the said ditch, he charged defendant with having cut it, with the intent that the water should break into it from the natural stream, and draw the water off from his premises; and that if the defendant did not stop the ditch and turn the water back again, the complainant would be obliged to bring an action against him; whereupon defendant desired complainant would give him time, until the following week, to take counsel, which was refused; complainant insisting that defendant knew it was a great disadvantage to him, and of no use to defendant, and that he would not have it for thousands of dollars; that the defendant did thereupon stop the waste and turn back the stream by stones, and at the same time informed complainant that he intended to take the water out of the channel at the turnpike road, and lead it out at his (defendant's) house; and complainant forbid him doing so, declaring that if he attempted such a thing he would prosecute him.

That the defendant afterwards commenced digging large drains and ditches upon his said farm, and dammed up the said ancient water-course at the said turnpike road, with the avowed intent and purpose of turning the waters thereof from their accustomed natural channel, upon and across his said farm, leading them to his own house, and diverting them altogether from the watering place of the complainant, and had in fact turned a large proportion thereof out of the natural channel, thereby diminishing the usual and necessary supply of water at complainant's watering place, to his great inconvenience and detriment, and contrary to equity and good conscience, and to the manifest wrong and injury of complainant.

The bill prays an injunction to restrain the defendant, his servants, &c. from diverting any part whatever of the waters of the ancient water-course out of their accustomed channel, and especially from doing any act whereby the ancient watering place upon the complainant's farm may be in any wise affected or injured, and his full enjoyment thereof abridged or impaired;

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and that if they have done any act whereby the same has been in any wise diverted, diminished, injured, or impaired, that they do forthwith return and restore the said waters to their ancient and accustomed channel.

On filing the bill an injunction was ordered to issue, restraining the defendant from doing any act to divert the ancient water-course.

The defendant, by his answer, filed on the fourth day of September, eighteen hundred and thirty-nine, states that he owns a certain farm in the township of Mansfield, in the county of Warren, where he now resides, and has resided since the spring of the year eighteen hundred and thirty-one, and adjoining to a certain other farm, lying southerly of the defendant's, now occupied (and owned as this defendant supposes) by the complainant, and upon which the complainant has made valuable improvements, as in the said bill is set forth.

That when he moved to the farm whereon he now resides, there was no water flowing across and over the same, and upon the lands next adjacent, and lying southerly thereof, except immediately after a rain and upon the melting of the snow; that there was anciently, as defendant has been informed, a small stream flowing from the hills and valleys, and crossing the farms which lie easterly of the defendant's, until it was lost, and entirely disappeared in a sink-hole upon the farm of John and Peter Wyer, which is the third farm easterly from this defendant's, between which and the defendant's farm, lie two others, to wit, Joseph Carter's and Benjamin Reigle's; that after the Morris canal was made, this stream became larger than it formerly was, as this defendant has been informed, and hearing in the summer of eighteen hundred and thirty-two, that his neighbors, the Wyers, Reigle and Carter, above him, were ditching upon their lands, in order to lead the said stream across their farms, he also immediately commenced digging a ditch across his own farm, (which ditch, and the others hereinafter

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referred to, are delineated upon a map or draught annexed to the answer, and which he desires may be taken as part thereof;) that when he came to the line between him and the farm now occupied by the complainant, then belonging to the heirs of Creveling, as he understood, being desirous of getting rid of the water at that time, he pushed it through under the fence, whence it found its way along the line, and upon the said adjoining farm, about forty-five yards, when it returned and flowed down upon the defendant's farm, to an ancient watering place, very near said complainant's house, where it formed a considerable pond upon the line between complainant and defendant; that near where this ditch strikes said line fence, between complainant and defendant, there was a low piece of ground, covered with bogs, and grown up with wild grass, which extended a little way upon complainant's farm, and from which, in the spring of the year several small springs issued, some upon defendant's land, and some upon the complainant's; but this defendant has never heard, although he has made particular inquiry, that there was an ancient watering place kept at this spot, nor does he believe there ever was, until the complainant made one there, and to which he has lately made a lane avenue.

That in time of high water, the said ditch would overflow, and the water spread over defendant's land and cover the same, and that solely with a view to prevent this in some measure, and to benefit himself, and not out of mere malice towards the complainant, or to vex, harass and injure him in mind or estate, he dug a shallow ditch along the line upon his own farm, to carry off the surplus water.

Denies that he ever, to his recollection, said that he intended to take the whole of the water out of the channel at the turnpike road, and lead it down to his house.

Admits that he has commenced digging a new ditch from the stream at the turnpike, for the purpose of leading a part of the water to his house, where he has no running water at the door; that he has made small drains from it, to water his meadow.

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ws; and that at the house, he intends to discharge the water to the ancient watering place or pond above mentioned, near complainant's house; and in order to turn a part of the water into said ditch, it became necessary to level the bed of the stream the turnpike, with the ditch; that accordingly, on the day fore the serving of the injunction, a part of the water was running into the new ditch, but before the next Monday, the mouth of the new ditch was stopped by some person or persons unknown to defendant, and the whole of the water turned back to the old ditch; that then the injunction was served on defendant, forbidding him to divert any part whatever of the water.

Insists that the defendant had a perfect right to make the old new ditch and drains, inasmuch as the said stream of water was originally brought upon his premises by ditching from farm to farm, in the manner herein before stated; and inasmuch there never was, in the recollection of the oldest people in the neighborhood, and as defendant verily believes, any ancient stream of water flowing across his said farm, and upon the farm of the said complainant, except in a time of a freshet, or melting of the snow, as before stated.

The complainant having filed his replication, a large amount testimony was taken by both parties, principally in regard to the character and duration of the water course, and whether it flow upon the complainant's land was natural or artificial. The cause came on for final hearing at the July term, eighteen hundred and forty-two, upon the pleadings and proofs.

Hamilton and *H. W. Green*, for complainant.

Vroom, and *L. H. Williamson*, for defendant.

Cases cited by the complainant's counsel: *Angel*, 1—5, 33, 50; *Saxton*, 157, 189; 1 *Vesey, sen.* 543; 2 *John. Chan.* 2, 463, 470; *Eden on Inj.* 166; 6 *Vesey*, 707; 3 *Vesey*,

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139; *American Jurist*, Oct. 1829, p. 205; 6 *East.* 208; *Saxton*, 187; *Sim. and Stu.* 190; 5 *Hals.* 78, 80; 3 *Hals.* 149; 3 *Kent's Com.* 439, 441; 4 *Bingham's N. C.* 381.

Cases cited by defendant's counsel: 4 *Mason*, 400; 6 *East.* 214; *Angel*, 74; 1 *Vernon*, 120; *Drewry on Inj.* 237; 16 *Vesey*, 161; 2 *Swans.* 333, 352; 2 *Vesey, sen.* 452; 3 *John Chan.* 282; *Eden on Inj.* 157, 166, 167, 188; *Hopkins*, 416; 4 *Hen. and Mun.* 474; *Angel*, 174; 3 *Mer.* 688; *Prec. in Chan.* 530; 3 *Mer.* 624, 628.

THE CHANCELLOR. This is a controversy between two very respectable and responsible persons of the county of Warren. It respects the right to water, which the complainant insists should flow to his land, for watering his cattle, and which right is denied him by the defendant. Difficulties of this kind are generally serious in their character, and often embarrassing in their adjustment. A stream of water is not only of the highest utility to a farmer, but it is also pleasant and cheerful to the eye. The case involves no privileges connected with a mill or mill seat; the stream is small, and its only use is for domestic and agricultural purposes. I have felt it my duty to look with care into this case, as well from my great respect for the feelings of the parties, who I perceive have it much at heart, as to satisfy them that the conclusion to which I have come has been attained upon sound and well established principles.

The complainant, by his bill, charges, that for many years he owned and occupied a farm of one hundred acres, about half a mile south of the defendant's, and which being destitute of water, proved a severe inconvenience. That an opportunity presenting itself, in the year eighteen hundred and thirty-five, he purchased the farm lying between him and the defendant, of one hundred and twenty-two acres, and that a principal inducement was to possess himself of a stream of water running from the defendant's land. That the defendant is the owner and in possession of the adjoining farm, over which there is an

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ancient water-course flowing from the Spruce Run turnpike, on to the complainant's land. That this stream was flowing there when the complainant purchased the last tract, commonly called the Creveling farm, and was always theretofore accustomed to flow in its natural channel.

The complainant states that he has bought other lands, and repaired and improved the buildings; and especially in reference to this water, has put up long lines of board fence, and made lanes on his place leading to it, as a permanent watering place for his horses and cattle. The stream is said to have disappeared for a short time in a sink-hole, but by ditching along the line of the stream and the reflow of the water, it again revived and returned to its ancient channel. The use of this water is declared to be indispensable, and the want of it to render the complainant's farm and improvements comparatively worthless.

After thus describing the situation of the parties, and their lands, the grievances are thus stated:—That the defendant, about two years before, dug a ditch near the partition line between the two farms of the complainant and defendant, and so near to the place where the water run, as to endanger its breaking away and carrying it down the new ditch on the defendant's side; and observing that such would be the result, the complainant sent to the defendant and caused him to fill it up with stones and turn the stream back. That upon doing this, he informed the complainant of his determination to take the water from its channel near the turnpike road, and lead it down to his house, and that he has actually commenced digging a drain for that purpose, and dammed up the ancient water-course, and turned a portion of the water into such new drain.

The prayer of the bill is, that an injunction may issue, restraining the defendant from thus diverting this ancient stream of water. The bill being verified, an injunction was ordered, in conformity with its prayer. The terms of the injunction are broad enough to cover any diversion of the water, but from the scope of the bill, it is quite manifest, it was only intended

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to apply to the water flowing from the turnpike, and not to the ditch near the partition line. That had already been put at rest, by the act of the defendant, in turning back the stream, and it was doubtless introduced into the bill to show the aggravated character of the defendant's conduct.

To this bill the defendant answered, and has placed his defence on the broad ground, that the stream in question is not an ancient water-course, and therefore the complainant has no right to it. The defendant states, that he purchased his farm and moved on it in the year eighteen hundred and thirty-one, and that at that time this stream did not run on his land at all, except in times of freshet, when it would flow not only on to him, but his neighbors. That the stream, prior to that time, came down no farther than Wyer's farm, which is the third farm above his, and there disappeared in a sink-hole. That in the year eighteen hundred and thirty-two, observing his neighbors above ditching, he dug a ditch across his own land, and pushed the water through the fence on the adjoining farm, now owned by the complainant. The defendant admits that he dug a ditch along the partition fence, but denies that it was done from any improper motive, but to carry off the surplus water in time of freshets. He also admits the digging of the ditch near the turnpike, and his intention to turn the water down to his house for domestic purposes, and to lead it through drains to water his meadows. The defendant further complains, that just before the service of the injunction, the water was turned back into the former channel; and he insists upon his right to make the ditch, and to use the water in the way proposed.

This statement shows the position of the case, and that the parties are at issue on a question of legal right. There has been a mass of evidence taken, unexampled in the court, and the cause is brought to a final hearing on the merits.

The first consideration that presents itself, and which was fully discussed on the argument, relates to the power of a court of equity over such a case.

Upon the case made by the bill, I had no doubt at the time,

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have none now. The jurisdiction of this court is of a pre-emptive character in cases of waste and nuisance, and comes in aid of the courts of law. It has long been exercised, and with great usefulness. It is founded on the necessity created by an insupportable mischief, and the inadequacy of pecuniary compensation.

The right to have water flow in its accustomed channel, is an acknowledged principle, for a breach of which the party injured may have his redress by suit at law, and in many cases by injunction. No mere pecuniary compensation will answer the ends of justice, and if the design is discovered in time, before the nuisance is carried into effect, may and should be remedied. The elementary treatises are full of cases of this character, and they will be found sustained by authority: *Fon-que's Equity*, 3, in notes; *Angel on Water-courses*, 75; *sey, sen.* 476, 543; 2 *Vernon*, 390; 2 *John. Chan.* 164; *Idon*, 192.

It is not so much against the general jurisdiction of the court, that the objection is raised, as to its exercise, when the defendant, as in this case, denies the complainant's right. It is the province of this court, as the defendant's counsel insist, to try this right, that belonging alone to a court of law, but to give relief in the possession whenever that right has been ascertained and settled. If it be intended to say, that a defendant settling his right by his answer, thereby at once ousts this court of jurisdiction, I cannot assent to it, for it would put an end, very soon, to the exercise of an important branch of the powers of the court. This question of right to water is often a very delicate matter, and it would be quite easy for a defendant to satisfy his conscience in his own favor. If it be intended to go no farther, than that it is a question which should be sent to law courts of doubt, and often should before injunction be first established by trial and judgment, then I agree to the proposition. A long enjoyment by a party of a right, will entitle him to restrain a private nuisance, even though the defendant may deny the right, and the court will exercise its discre-

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tion whether to order a trial at law or not, always inclining to put the case to a jury if there be reasonable doubt. In the case cited from 2 *John. Chan.* the chancellor refused to send the question of right to be tried at law, saying it was clear enough; and a case is cited from *Prec. in Ch.* 530, where a plaintiff who had long been in possession of a water-course, was quieted by injunction, though he had not established his right at law.

We must then look at the case on its merits, and there are a few plain and well settled principles that must control it. Water must be allowed to run in its accustomed channel, and may be used by all the riparian owners through whose land it may run, but it must be so used as not to deprive those lower down on the stream, of its use in the way which they have been accustomed to use it. There is, however, a length of time, and which in England and in this state is twenty years, in which any particular use of water, or diversion from its accustomed channel, if undisturbed and uninterrupted, will raise the presumption of a grant. It is said, too, and upon the same reason, that as twenty years' possession will give a right, so a nonuser for the like term will put an end to it. This subject will be found very clearly discussed in 3 *Kent's Com.* 353, and in *Angel on Water-courses*, 70. What constitutes a water-course, should also be well settled, and must be kept in mind, in looking into the evidence in this case. Many of the witnesses evidently call a declivity into which the water must run, if there be water, a water-course, and all their opinions are expressed upon that idea. One of them, upon being asked what he meant by a water-course, says, where it would run if there was water to run; others say they consider it an ancient water-course because it is a place where in a freshet it would run. This is the prevailing view taken by the witnesses, and they are correct, so far as they describe the course that the water would flow; but when speaking of a water-course, something more is intended. There must be water as well as land, and it must be a stream usually flowing in a particular direction: it need not flow con-

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ually; many streams in the country are at times dry. There is a wide difference, however, and the distinction is well known, between a regular flowing stream of water, which at certain seasons is dried up, and those occasional bursts of water, which, at times of freshet or melting of snows, descend from the mountains and inundate the country.

Carrying with me these principles, and which I believe indisputable, I have looked into this evidence, and after some deliberation, come to a conclusion upon it, entirely satisfactory to my mind. In such a volume, it could not be otherwise, than that there should be much discrepancy. It will always be so, where the matter depends on matter of opinion, or where the occurrences are of ancient date. And yet I am not disposed to think, after a second reading, that there is as much actual difference as I supposed, though there is some of the evidence utterly irreconcilable with any other than the view given. In all such cases the court must be governed by the weight of evidence, after giving upon it all the most charitable construction for the witnesses. Nor have I so much doubt on which side this is, as to think it proper to send the case down for a trial at law. Indeed, the evidence is all here, and I feel that I should meet it and decide upon it. The conclusion to which I come is, that the complainant has failed to show his right in the stream in question, as an ancient water-course. That whatever might have been the original course of this water, there has elapsed a period more than twenty years, during which it has been detained on the farms above, and upon which a grant may be presumed. The term of twenty years, in New-Jersey, limits the action of ejectment, and bars the right of entry on lands. The same principle applies to the present case. The evidence, even upon the complainant's side, would leave much doubt upon this part of the case; for many of the witnesses, and particularly Aaron Myers, Frederick Medagh, William H. Lane, Adam Rinehart, John Late, Luther C. Carter, Jacob Myers, John Parke, and John Scott, all confine the running of the water over the turnpike, to freshets. Added to these, the evidence of the defend-

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ant is entirely satisfactory, and must be so, I think, to any impartial mind, of the true state of the facts. These witnesses, many of them, were the former owners and occupants of the farms now belonging to these parties; men that ploughed and reaped on the very spot now called the water-course.

Colonel William McCulloch formerly owned those farms, and that more than forty years ago; his son, William B. McCulloch, lived there with his father, and was often over the land; Captain Henry, forty years ago, lived for twelve years on the defendant's farm; John Skinner lived two years on the complainant's place, twenty-six years ago; Abraham Woolston has known those farms since seventeen hundred and eighty-eight; James Groff lived on defendant's farm twenty-nine years ago; John Fialer worked the defendant's farm, fifty years ago; William Hazlett worked for captain Henry, on his place, thirty-five years ago; William M. Creveling lived on complainant's place in eighteen hundred and seventeen, and continued four years; Imla Drake lived on complainant's place five years, thirty years ago; Benjamin Reigle owned the Reigle farm in eighteen hundred and twenty-nine; and Peter Wyer lived on complainant's place for ten years, and left it only eight years ago. Such witnesses ought, surely, to know what was the condition of this water, and from the venerable and excellent character of some of them, ought to have our fullest credit and confidence. They, one and all, testify that there never was, to their knowledge, any stream of water running across the Spruce Run turnpike, on to the defendant's land, except in times of freshet. They go further, many, if not all of them, and declare, that along the place where the supposed water-course is, they raised grain, and regularly ploughed and reaped. The water is stated to have sunk on Wyer's farm, and not to have descended to any of the farms below. They further say, that there was no watering place formerly where complainant now has one, but that the cattle on both the complainant's and defendant's farms were watered near the complainant's house, where there is still a good supply of water. It will be perceived

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at this evidence covers a period of more than thirty years, in which the water never run, except in freshets, on to the defendant's land, and down to about eight years last past. There are any other equally respectable witnesses to the same purport, but these are selected as having superior means of knowledge. A man that has lived on and worked a place, has much greater opportunities of knowing every thing that appertains to it, than a mere passer by. The evidence of judge Robeson, who owns the turnpike, is also in accordance with this view. Besides, there is the positive testimony of James Vannata, and the deposition of Berlin Metler, corroborating the defendant's answer, that in eighteen hundred and thirty-two they assisted in digging the ditch, through which the water has since run on to the complainant's land.

This is the commencement, as I think, from the whole evidence, at any rate for the last forty or fifty years, of any regular stream passing on the complainant's land. This can confer no right on the complainant, unless it had continued for a period of twenty years. He had no right to turn the water there without the complainant's consent, and the defendant exercised himself to an action for so doing; but I can see no principle of law that can prevent his taking it away again, and turning it in any direction, at any time within the term of twenty years. I cannot fail to remark, that much of the confusion in the testimony, has appeared to me to arise from two causes, in not distinguishing whether, when the water run, it was a time of freshet or not, and from the fact that water did run, and more formerly than now, from springs on this same lot of the defendant's, to the complainant, and to this same spot along the partition fence.

There are one or two other suggestions in the case, that I would notice.

The water is said to be of very great importance to the complainant, and none to the defendant. This, it is obvious, if true, cannot enter into the decision; the right must be settled irrespective of the wants of the parties. I confess, that if I felt

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myself in the position of a mediator, so great do I consider the complainant incommoded by the loss of this water, I would strenuously urge upon the defendant, the propriety and justice, as among neighbors, of allowing a portion of it still to run to the complainant's watering place. It is my duty to settle the rights, and leave subject of accommodation to the parties themselves.

The complainant is charged with having improperly used the process of this court, by causing the water to be turned from the new ditch into the old channel, on the very day the sheriff came down, and immediately thereafter serving the injunction. The evidence gives color to such a suspicion. From the character of the complainant, I cannot believe, if it was so, he was actuated by any other belief, than that he might lawfully do it. To guard against any such course for the future, I must express my decided disapprobation of it, and my present conviction, that if made known, I should have felt constrained not only to correct the evil, but to dissolve the injunction absolutely and entirely.

As to costs, I have concluded, after some hesitation, to let each party pay his own. There are two reasons which induce me to this course; one is, that the defendant may be said to have occasioned this controversy, by leading the water, many years ago, on to the complainant's land, and thereby prompted him to make his new arrangements for watering his cattle; the other is, the great and unnecessary expense of witnesses, so exorbitant on both sides, as to make me desire, in any result, that each party should pay for his own, and indeed, I doubt the propriety of charging it against the adversary. There have been examined between one hundred and thirty and one hundred and forty witnesses, when a much smaller number, and perhaps a very few, well selected, would have disclosed the true nature of the case. The bill must, therefore, be dismissed, but without costs.

Decree accordingly.

BRINKERHOFF V. BENJAMIN VANSICVEN and CORNELIUS VANVALER.

of the most familiar and well settled principles of a court of equity, the vendor of real estate, has a lien on the lands sold for the purchase money.*

It exists not only as against the vendee, but also as against persons coming under him with notice.

It constitutes the lien as against a purchaser under the original vendee, there being notice of the indebtedness, and that the indebtedness arose upon the purchase of the property.

It is necessary that there should be notice that the indebtedness constituted a lien on the land.

Acceptance by the vendor of other than the personal security of the vendee, or any other circumstance showing that the vendor does not look to the land as his security, will be an implied waiver of his lien.

Payment of the note or bond of the vendee for the purchase money, will extinguish the lien.

A new agreement is necessary to create the lien; it results as an incident to the sale, unless it be expressly waived, or there be such special circumstances as show that the parties did not intend the lien should exist.

The giving of a mortgage by the purchaser, for a part of the purchase money to a third party, on the day of the purchase, will not affect the lien, between the vendor and vendee.

The bill is for foreclosure, and to establish a lien upon real estate for the purchase money. The bill charges, that the defendant, being seized in fee simple of three certain lots of land and premises situated in the townships of Lodi and New-Barren, in the county of Bergen, in the bill particularly described, on or about the first day of June, eighteen hundred and eighty, agreed with Benjamin Vansciven, one of the defendants, to sell and convey the said lands and premises to him, for the sum of one thousand and one hundred dollars; one half of which was to be paid in cash, on the delivery of the deed, and the other half on the first day of May, then next en-

* See *Vandoren v. Todd et al.*, ante, vol. ii. page 397.

That in pursuance of the said agreement, the complainant, by deed of indenture, made by himself and his wife, dated on the first day of June, eighteen hundred and thirty-eight, but executed and delivered on the fourth day of the said month of June, conveyed the said lands, in fee simple, to the said Vansciven, who accepted the said deed, and on the delivery thereof, paid to the complainant five hundred and fifty dollars, one half of the consideration money, and as evidence of his agreement to pay the remaining half of said consideration money, then made and delivered to the complainant his promissory note for five hundred and fifty dollars, dated on the said first day of June, and payable on the first day of May then next; that five hundred dollars of the principal of the said note, with interest thereon from the time it became due, still remains unpaid; and that although the deed executed by the complainant and his wife, may contain a receipt and release for the full amount of the consideration money for the said deed, the same was never paid in full, but that the complainant retained, and still retains a lien upon the said lands, for the said sum of five hundred dollars, and that he has never consented to waive or relinquish his said lien, nor accepted or received any other security whatever, for the payment of the said sum of five hundred dollars, the balance of the said purchase money.

1. The bill further charges, that the said Benjamin Vansciven, in order to pay to the complainant the said sum of five hundred and fifty dollars, part of the said purchase money, borrowed that amount of Abraham Westervelt, and to secure the payment thereof, made and executed to the said Abraham Westervelt his bond for the said sum of five hundred and fifty dollars, payable in one year, with interest, and also a mortgage upon the said lands, which was duly acknowledged and recorded. That on the seventh of March, eighteen hundred and forty, the said Abraham Westervelt, at the request of the complainant, and for the consideration of five hundred and seventy-eight dollars, duly assigned the said bond and mortgage to the complainant, and that the whole of the principal of the said bond, with in-

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rest thereon from the first day of June, eighteen hundred and thirty-nine, still remains due and unpaid.

That on or about the sixth day of January, eighteen hundred and forty, the said Benjamin Vansciven and Rachel his wife, by deed bearing date on that day, and purporting to be for the consideration of nine hundred dollars, conveyed the said lands and premises to Cornelius Vanvalen, subject to the said mortgage, which was assumed to be paid by said Vanvalen. That at the time of the said last mentioned conveyance, both Vansciven and Vanvalen well knew that the sum of five hundred dollars, part of the original purchase money for the said conveyance by the complainant to Vansciven, with interest thereon from the first day of May, eighteen hundred and thirty-nine, remained due and unpaid; and the bill insists that the said lands remain subject, in the hands of Vanvalen, not only to the said mortgage, but also to the lien of the complainant, for the said sum of five hundred dollars, the residue of the said purchase money remaining unpaid.

The bill further charges, that the said lands and premises were conveyed, as aforesaid, by Vansciven to Vanvalen, for the express purpose of defrauding the complainant, and so that the same might not be subject to any judgment or execution which the complainant might obtain at law for the residue of the said purchase money; and they were so received by Vanvalen, who was to hold the same for the benefit of Vansciven, the pretended consideration of the said conveyance never having been paid.

The bill prays an account; that the premises may be sold, and that out of the proceeds the complainant may be paid the amount due upon his said bond and mortgage, with interest, and also the said sum of five hundred dollars, the balance of consideration money so due to him, as aforesaid, with interest.

Separate answers were filed by the defendants. The incumbrance of the mortgage was undisputed. The grounds of defence insisted on against the lien for the purchase money, are stated in the opinion of the chancellor.

Zabriskie and *I. H. Williamson*, for complainant.

G. Cassidy and *A. Whitehead*, for defendants.

Cases cited by complainant's counsel. 15 *Vesey*, 330; 1 *John. Chan.* 308; 2 *Rand.* 428; 1 *Mason*, 191; 4 *Kent*, 145; 1 *Paige*, 20; 3 *Paige*, 513; 2 *Edwards*, 505; 1 *Vernon*, 267; 2 *Eq. Cas. Ab.* 682; 1 *Sch. and Lef.* 132; 7 *Yerger*, 1; 3 *I. I. Marshal*, 558; 1 *Mitford's Pl.* 216; 1 *John. Chan.* 288, 302; 1 *Hopkins*, 48, 55.

Cases cited by defendants' counsel. 1 *Powell on Mort.* 565; *Ambler*, 724; 1 *Paige*, 494; 2 *Dess.* 509; 2 *Mad. Chan.* 105; 1 *Fonb. Eq.* 131, 2; 6 *Binney*, 118; 4 *Wheaton*, 256, 290; 2 *Green*, 212.

THE CHANCELLOR. The facts in this case, lie within a very narrow compass. The complainant, on the first of June, eighteen hundred and thirty-eight, sold to the defendant, Vansciven, a piece of land in Bergen county, for eleven hundred dollars. He received, at the time of the sale, a cash payment of five hundred and fifty dollars, being half of the consideration, and took a note of Vansciven for the remaining half, payable on the first of May next after its date. The only question involved in the cause is, whether the complainant has a lien in equity, under the circumstances of this case, upon the land, for the payment of his note.

Abraham Westervelt, at the time of the sale, loaned the five hundred and fifty dollars to Vansciven, (which he paid to complainant,) and took a bond and mortgage on the property as his security. I do not perceive that the complainant had anything to do with the loan, or can in any way be involved in it; but he has since paid to Mr. Westervelt the amount due upon his bond and mortgage, and taken an assignment of them, before instituting this suit. This was done, no doubt, to remove out of the way any dispute about the Westervelt mortgage, and

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possibly, as suggested on the argument, to protect himself from costs, if the suit was decided against him. Whatever may have been his object, he had a right to take that course, and to use the mortgage as he has done, so long as the defendant is not obstructed in the course of his defence.

The bill has two objects; to foreclose the mortgage, and to establish and enforce the lien, insisted upon, for the complainant's note. There being no dispute on the mortgage, the controversy is alone as to the lien, except it may be about the costs.

At the time of the sale, it does not appear that the complainant took any mortgage or other security for his note, or that there was any special agreement made that the note should or should not remain a lien on the land. There was nothing express on the subject, one way or the other, either affirming or waiving it. It was left to be governed by the operation of law in such cases.

On the sixth of January, eighteen hundred and forty, the defendant, Vansciven, having put improvements on the property, sold and conveyed it to the defendant, Cornelius Vanvalen, for the consideration, as stated in the deed, of nine hundred dollars. The mortgage to Westervelt made a part of the consideration, and was to be paid by Vanvalen. The improvements put on by Vansciven consisted of a small house and kitchen, of the value of four or five hundred dollars. It is charged in the bill, that when Vanvalen bought, he knew that five hundred dollars of the consideration money of this land, remained unpaid from Vansciven to the complainant, (this being the amount unpaid on the note.) Vansciven in his answer admits, as must necessarily have been the case, that he knew before and at the time of the giving of the deed to Vanvalen, that five hundred dollars was due complainant on his purchase of the property, but whether Vanvalen knew this or not, he says he cannot state. The answer of Vanvalen is certainly designed to carry the impression that he knew nothing of this debt, and particularly as constituting any part of the consideration for the land sold Vansciven. Some very just exceptions are however taken to the

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answer, in meeting this important charge in the bill. The defendant does not frankly and openly say, that at the time of his purchase he knew nothing of the existence of this debt, but the language is, that he had no personal knowledge of it. If he means by this, that he never saw the note, or was not present at the time it was given, or at the making of the agreement between the complainant and Vansciven, then certainly it is no answer to the bill, for all this may be true, and yet the defendant have had all the knowledge by information, which the case requires. The other parts of the answer, do however, meet the charges more directly and fully, by declaring that the defendant knew Vansciven was indebted to complainant, but not on what account. The defendant further declares, that shortly after the conveyance of the lands to him, (as he believes,) he was for the first time informed of the existence of the said note, by Abraham Westervelt. The answer might, and should have been certain, on a matter so important and so recent as this, and particularly so, as it lay within the breast of the defendant. But waiving all further criticism, I take the answer, and shall so be governed by it, as denying any knowledge that complainant held a note or other demand, arising from the sale of the land to Vansciven; that he knew he owed him, but not that he owed him any part of the consideration money on this purchase.

The equitable lien which the vendor has on the lands sold for the consideration money, is one of the most familiar and best settled principles of the court. It is founded on the justice and propriety of securing to the man that parts with his property, the first claim to be paid out of it, before any other person. As between vendor and vendee, and between vendor and a purchaser from the vendee with notice, the lien clearly obtains. The notice must go farther than that of a mere indebtedness by the vendee to the vendor, it must extend to a knowledge of an indebtedness on the purchase of the property. These are the only facts that he should be notified of; he need not be informed whether such indebtedness constitutes a lien on the property or not; that is matter of law, of which no notice is required. So

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too, if the vendor take any other than the personal security of the vendee for his money, as the note of a third person, a transfer of stock, or a mortgage for a part only of the consideration money, these or any other circumstances, going to show that he does not look to the land as his security, will be taken to be an implied waiver of the lien, and discharge the land from further liability. Although somewhat disputed, yet upon examining the cases, it is now settled, and upon good reason, I think, that the taking of a mere note or bond of the vendee, will not avoid the lien. If the party looks to the vendee alone for his money, without taking any other or further security, the land is liable.

There need not be any express agreement, at the time of the sale, to create the liability; it results as an incident to the transaction, unless it be expressly waived, or there be such special circumstances as to show that the parties did not intend the lien should remain. The lien exists, unless there is a manifest intention it should not exist. Lord Eldon has reviewed with great pains all the English cases, in the case cited of *Mackreth v. Symmons*, 15 *Vesey*, 328. That cautious and learned chancellor has gone over the whole subject, and settled the doctrine in conformity with the general current of authority, on a firm basis, and which is not likely to be again shaken. He designed, no doubt, to put the subject at rest. As applicable to the case under consideration, the language of the chancellor, at the close of his opinion, is very conclusive. He says, "from all these authorities, the inference is, first, that generally speaking, there is such a lien; secondly, that in those general cases in which there would be the lien, as between vendor and vendee, the vendor will have the lien against a third person who had notice that the money was not paid. These two points seem to be clearly settled."

In *Fish v. Howland*, 1 *Paige*, 20, the present chancellor of the state of New-York has, with great care, reviewed the cases not only in the English chancery, but in the courts of equity in this country. The general principle of this lien is

fully recognized in this country, and will be found to obtain in most of the states, if not in all, where they have a court of equity. It not being a legal incumbrance, can of course have no existence in those states who have no equity courts to enforce it. The doctrine has long been recognized in the state of New-York; it has been also recognized in the courts of Kentucky and Tennessee, and in the court of appeals in Virginia. It is expressly decided, however, in the supreme court of the United States, in *Bayley v. Greenleaf*, 7 *Wheaton*, 46, that this lien cannot interfere with creditors holding under a bona fide mortgage from the vendee, or a subsequent purchaser without notice. Chancellor Kent, in the fourth volume of his *Commentaries*, 151, treats the subject as a well settled principle of equity jurisprudence, both in England and in this country.

But it is earnestly contended, that whatever may be the rule in England or in other states, as to this implied lien, it has never been recognized in this state, and should not be. I do not know of any case in New-Jersey, where the question has come up, or I have no doubt the doctrine would have been affirmed. I have myself recognized it in an ex parte case, although it is true, that case went much farther, and might well be settled as it was, on other grounds. Why should not this principle be applied to us? There is nothing peculiar in our institutions affecting a question of this character, and certainly not in distinction from other states of the union. It is a doctrine founded on the experience of years, enforced by some of the wisest and best men that have adorned the bench in that country from which we are descended, and from whose system of jurisprudence ours is derived. This has been followed, too, in the state of New-York, a people with whom we are closely allied, and with whose laws we are, in many respects, identified. I can find nothing on which I am willing to rest, in this course of argument. The great principles of equity apply in this, with as much force as in any other state, and its courts are bound to respect, and should be governed by the lights of experience which may be furnished from other sources. Nor will it vary

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a case, whether the decisions are made prior or subsequent to the Revolution. I do not mean to declare the decisions of the English courts, or those in other states, as binding upon us, but they are to be used as guides on all the great questions arising under our system of jurisprudence, and we should be blind to our interests not to profit by their experience and wisdom. It was further, in this case, insisted, that the giving of a mortgage by the purchaser, (Mr. Vansciven,) to Mr. Westervelt, for the hundred and fifty dollars of the purchase money, on the day at the deed was delivered, places the complainant in the same position as if he had himself taken a mortgage for a part of the consideration money for the land. This cannot be so. He received his payment in cash, and it surely cannot vary the case, whether Vansciven had the money on hand or borrowed of another. Receiving as the complainant did, the money for which this mortgage was given, a question might have arisen between him and Mr. Westervelt, whether his lien was prior or subsequent to the mortgage. But that question is put out of the way, and the lien is only claimed, subject to the mortgage.

It remains to be seen from the evidence, whether Vanvalen, the purchaser from the original vendee, had notice of the existence and of the non-payment of the lien. His answer, as we have observed, virtually denies any knowledge, except that Vansciven owed the complainant. On what account he owed him, he professes not to have known.

It would, at first blush, seem rather surprising, that persons situated as these defendants were, should not freely have communicated with each other on all subjects of this character, but may be that they did not. It is my duty to be guided by the evidence, and I must declare my conviction that proof of notice made out, and in a satisfactory manner. Abraham Westervelt, whose testimony is unimpeached, and a gentleman admittedly of intelligence and undoubted integrity, testifies, that before the conveyance from Vansciven to Vanvalen, the latter called on him, and asked about his mortgage, and whether it

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could lay or not; he also asked whether there was any other incumbrance on the property, and said he would buy the property if he could. The witness says, he told him he did not know whether there was any other incumbrance on the property or not, but that Mr. Brinkerhoff (the complainant) held Vansciven's note for a part of the purchase money for the place. Vanvalen then asked the witness if that was an incumbrance on the place. The witness told him that he did not know that it was any incumbrance, but he did not think it more than right that Mr. Brinkerhoff should be paid his note. Here, it will be observed, is not only direct and positive notice of the incumbrance, but a suggestion made by Mr. Vanvalen himself, whether the note did not bind the land. Elisha Utter also testifies, that he worked at the house built on the premises, by Vansciven, in company with him and Vanvalen, who was the carpenter that built it, and at noon-spells heard them talk about the note that complainant held for a part of his purchase money, and the amount due on the note was stated. This was while Vansciven owned the place. Here, then, are two witnesses unimpeached, and they overcome the answer, even if admitted to be explicit in its terms.

I decide this cause upon the ground that the complainant has an implied equitable lien on the property sold to Vansciven, for the payment of his note, which he is entitled to have the aid of this court to enforce against the property in the hands of Vanvalen, he being a purchaser with notice.

Taking this view of the case, it is unnecessary that I should examine the alleged fraud in the sale, made by Vansciven to Vanvalen. It is charged to have been only a contrivance to defraud the complainant out of the note. I pass it by, as not necessary to be settled here, but I am very far from being satisfied with the bona fides of the transaction. The result of this case would be the same, let the sale made by the one defendant to the other have been designed in fraud or otherwise, the only effect of believing it a fraud, is to relieve the mind from all anxiety for any supposed hardships in the case, towards Mr. Vanvalen.

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The complainant will be entitled, after a master shall have reported the amount due on his bond and mortgage and note, to a decree for a sale of the property, to pay that amount, with costs, out of the property.

Reference to a master.

HERMAN BRUEN and Wife v. JOHN BRAGAW et al

Lands acquired after the publication of a will, will not pass by a devise in the will.

BILL for specific performance. Demurrer for the want of equity.

This was an amicable suit, for the purposes of obtaining the opinion of the court upon a question of law. The nature of the case is clearly stated by the complainant's counsel.

C. Parker, on behalf of the complainants, submitted the cause on the following brief.

The bill of complaint in this cause recites, and is founded on, certain articles of agreement for the purchase and sale of land, situate in the city of Newark, duly sealed and executed, dated April first, eighteen hundred and forty-one; whereby Herman Bruen agrees to sell, and Bragaw, one of the defendants, to buy the same. The articles provide, that if one Alexander McWhorter, now a minor, should prove to have any interest in the land in question, Mr. Bruen will convey the title of all persons having an interest in the land, except the said minor's, and with the conveyance of the same deliver a bond with surety, in the penalty of fifteen hundred dollars, conditioned to save harmless, &c. against the claim of said McWhorter, when of age. On the delivery of such deed and bond, Bragaw engages to pay four thousand three hundred dollars.

The bill then avers Bruen and wife (Mr. Bruen being seized

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in right of his wife) to be ready to perform the agreement on their part, and when paid the said four thousand three hundred dollars, to deliver the deed aforesaid and bond; but charges, that Bragaw, confederating with the other defendants, refuses to perform, on the ground that the complainants are unable to make a good title, for the reasons following :

1. Because this property passed by the will of Mrs. Phebe McWhorter, deceased, under the residuary clause thereof, to James Bruen and George H. McWhorter, two of the defendants, as trustees, to hold the same and pay the profits to Mrs. Bruen, the complainant, and at her death to convey to her issue her surviving; that Mrs. Bruen now has two children, Herman W. Bruen and Adriana McWhorter Bruen, junior, also defendants, so that their rights are vested; or,

2. Because by a proviso in the same will, if Mrs. Bruen, then Miss Adriana McWhorter, did not, before her marriage, settle to her sole separate use, the property she derived from her father, the bequest to her was to be void, and shift to "The Trustees of the Theological Seminary of the Presbyterian Church;" and she having made no such settlement, this property, with the rest, had so shifted; or,

3. Because the will did not pass the property, and the title to it was, therefore, in the heirs-at-law of Mrs. McWhorter, viz.: Juliana M. Macomb, widow, Mary C. Howell, widow, George H. McWhorter, and Mrs. Bruen, the complainant, beside Alexander McWhorter, junior, the minor mentioned in the agreement.

Whereas the complainants charge, that,

1. Mrs. McWhorter's will bears date April first, eighteen hundred and twenty-six, while this property did not vest in her, Mrs. Phebe McWhorter, deceased, until Alexander M. Taylor and wife, then seized, did by deed, dated March third, eighteen hundred and twenty-nine, convey the same to her; wherefore, by law, no title in the property passed to the trustees aforesaid, but that it descended to the heirs at law aforesaid.

2. That the heirs at law, by deeds dated as follows: Mary

[Breen v. Bragaw et al.]

C. Howell's, July twenty-first, eighteen hundred and forty-one; Julia M. Maccomb's, June first, eighteen hundred and forty-one; George H. McWhorter and wife's, June fourteenth, eighteen hundred and forty-one—duly executed and recorded, did convey all their title to Mrs. Bruen, one of the complainants; so that all title has vested in her, and can be conveyed by her, save that of Alexander McWhorter, junior, whose rights were excepted by the agreement as above mentioned.

3. That if the title did vest in the trustees, (which they deny,) Mrs. Bruen did, prior to her marriage, make the settlement provided for by the will, wherefore no title can have possibly vested in the Trustees of the Theological Seminary of the Presbyterian Church; and the reasons of the defendants being, therefore, insufficient, they pray a specific performance.

To this bill, (all the defendants having appeared, the minor children of complainants by their guardian, *ad litem*, Alexander M. Bruen, the rest by regular acknowledgment of service, &c.) two demurrers have been filed; one by the Trustees of the Theological Seminary, and the other by A. C. M. Pennington, solicitor for all the other defendants.

On these demurrers the question is, the facts being admitted, ought a decree to pass for complainants; depending, it is apprehended, wholly on the question, Does a will published previously to the seizin of real estate by the testator, affect such after acquired property?

The courts of law hold, that a devise affecting lands, can operate on those only of which the testator was possessed at the time of executing his will, and not on any lands acquired afterwards: 6 *Cruise's Digest*, 34.

In support of this, he refers to 11 *Mod.* 121; 1 *Salk.* 237; 3 *Bro. Par. Cases*.

Judge Kent says, (1 *Com.* 510,) "It is the settled rule of the English laws, that the testator must be seized of the lands devised at the time of making the will. The devise is in the nature of a conveyance or an appointment of a particular estate,

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and therefore, lands purchased after the execution of the will, do not pass by it."

The decisions proceed upon the ground, first, that devises of lands were appointments to *uses*, wherefore they could operate on such only as were possessed by testator at the time of such appointment; second, on the language of the statute of wills, its words being, "all and every such person having manors, &c., or having a sole estate, &c." from which it follows that deviser must have the estate at the time of making his will, for he cannot devise what he has not in him then: 6 *Cruise's Dig.* 34.

Blackstone (2 *Com.* 378) makes the reason of the rule, the fact that the law considers wills of land in the light of a species of conveyance. Vide, also, on this point, lord Mansfield, in *Harwood v. Goodright*, *Cowper's Reports*, 90.

The rule is so rigorous in England, that no lands after purchased, though the testator saith so, may pass by the will: 1 *Williams' Ex.* 7, and notes.

The law is the same in every state in America, which has not altered the common law by statute. The New-York revised statutes have done so, but before their operation, the English rule prevailed. Vide *Jackson v. Potter*, 9 *John.* 312; *McKinnon v. Thomson*, 3 *John. Chan.* 367; *Livingston v. Newkirk*, 3 *John. Chan.* 312; *Minuse v. Core*, 5 *John. Chan.* 441.

In Massachusetts, the English rule is the fixed law: *Ballard v. Carter*, 5 *Pick.* 114; *Hays v. Jackson*, 6 *Mass.* 149.

In Maine, the general rule of the English law was admitted: *Carter v. Thomas*, 4 *Greenleaf*, 341.

In Pennsylvania the same rule holds: *City of Philadelphia v. Davis*, 1 *Wharton*, 490; *Gerard v. City of Philadelphia*, 4 *Rawle*, 323.

Though there has been no decision on this point in New-Jersey, the law is, it is believed, in practice, firmly settled according to the English rule. The point is raised now, in order to

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tain the sanction of a court of law directly to the point, and the suit is amicable for that purpose.

A dictum of chancellor Vroom, in *Stark v. Hunton*, *Sax-*
on, 228, 229, implies that the law in New-Jersey coincides in
his respect, with that of the states above referred to.

We have, properly speaking, no statute which like 32 *Henry viii.*
c. 1, originates the right to devise lands. Our statute is but a copy
of 29 *Car. ii.*, c. 3, s. 5, implying as did that, the possibility of
conveying lands by devise. No argument can, therefore, be
drawn from the words of that statute, as not containing the word
"having," supposed by some judges to lay at the foundation of
the law in question. Did the absence of the word repeal the
law on this subject, its absence in the statute, 29 *Car. ii.*, of
which ours is a copy, would produce the same effect.

The better reason for the rule, however, is given by Black-
stone, lord Mansfield and others; that a devise is a conveyance,
operating from its execution, and cannot take effect on what the
testator had not, then, the right to convey.

THE CHANCELLOR. The demurrer presents for decision in this
case, the sole question, whether lands acquired after the execution
of a will, will pass by a devise in the residuary clause of that will.
We take it to be well settled, that they will not. The devise is in the
nature of a conveyance, and it can affect no lands purchased after
the will is executed. This is clearly the rule of the English
law, and in most of the states, except where a change is made
by statute: 3 *John. Chan.* 310; 4 *Kent's Com.* 510; 9 *John.*
12; 6 *Muss.* 149; 11 *Modern*, 121; 1 *Salk.* 237; *Sax-*
on, 229.

The demurrer must, therefore, be overruled with costs.

Order accordingly.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY.

JANUARY TERM, 1843.

EZEKIEL C. HOWELL v. JOHN D. HESTER et al.

A sheriff's sale, regularly made by virtue of an execution out of this court, set aside, on the ground that a party having an incumbrance subsequent to the complainant, was by a mistake of her agent prevented from attending the sale, and that the premises sold for an inadequate price, to the prejudice of the party seeking to avoid the sale.

THE complainant in this cause filed his bill, for foreclosure and sale of mortgaged premises, against the mortgagor and others having subsequent incumbrances. At July term, eighteen hundred and forty-two, a decree pro confesso was taken against all the defendants, and an execution issued thereon to the sheriff of the county of Mercer, for the sale of the mortgaged premises, to satisfy the complainant his mortgage debt of five hundred and forty-seven dollars and twenty-eight cents, and his taxed costs, amounting to sixty-eight dollars and sixty cents. The premises were advertised for sale and sold by the sheriff, on the seventh of October, eighteen hundred and forty-two, for one hundred and twenty-five dollars. On the fourteenth of October, Mary Hester, administratrix of Jacob Hester, deceased, filed her petition to set aside the sale.

[Howell v. Hester et al.]

The petition states, that the said premises consist of a lot of land, situated on Greene street, in the city of Trenton, and were worth at least five hundred dollars; that in the present depressed value of real estate, the said premises would readily have commanded, and will now command, even at a forced sale, the sum of four hundred dollars, and there were persons ready and willing, as the petitioner hath been informed and believes, to bid that sum, and would have bid that amount or more, had they not been prevented from attending the sale, as herein after stated; that the petitioner is herself aged and infirm, unable to go out, and entirely unaccustomed to business; that she therefore requested her son, Isaac A. Hester, to take charge of the business for her, to attend the said sale, and to see that the property brought a fair value; that the said Isaac A. Hester assured her that he would do so, and the petitioner, confidently relying upon his attention to the sale, gave herself no further concern respecting it, and employed no one else to attend on her behalf; that after the said sale she was to her great surprise and astonishment informed, and she so believes and charges the truth to be, that neither the said Isaac A. Hester, nor any other person, attended the said sale on her behalf, but on the contrary thereof, the said Isaac A. Hester, laboring under some misapprehension in regard to the time of the sale, actually prevented persons desirous of purchasing the property, from attending the sale, by informing them that the sale would take place on the eighth day of October, the day after the sale was actually made. That in consequence of such mistake and misinformation, no bidders whatever attended the said sale, and no person bid for the premises except the sheriff, who bid one hundred dollars, and the said Jacob C. Howell, who bid one hundred and twenty-five dollars, upon which bid the premises were struck off and sold; that the said Jacob C. Howell is the brother of the said complainant, and as the petitioner believes, attended the said sale on his behalf, but whether he bid for the said property for himself, or as agent of the said complainant, the petitioner knows not, save from the declaration of the said Jacob C.

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Howell, made since the sale, that he purchased the said premises for himself; that on the twenty fourth day of February last, the petitioner, as administratrix as aforesaid, recovered judgment against the said John D. Hester, in the supreme court of New-Jersey, whereupon execution issued to the sheriff of the county of Mercer, by virtue whereof she acquired a lien upon the premises so as aforesaid sold to the said Jacob C. Howell; that there remains due upon the said judgment the sum of two thousand dollars of principal, besides interest and costs, and that by reason of said incumbrance the petitioner was made a party defendant in the said bill for foreclosure; that the said John D. Hester is insolvent and utterly unable to pay his debts; that on or about the thirteenth day of May, eighteen hundred and forty-one, the said John D. Hester made an assignment in the city of Philadelphia, and state of Pennsylvania, to one Amos Phillips, of all his estate, real and personal, in trust for the creditors of the said John D. Hester, creating certain preferences among them; that in the first class of creditors named in the said deed of assignment, are the said Jacob Hester, deceased, and the said Ezekiel C. Howell; that the petitioner, administratrix as aforesaid, has presented her claim against the said John D. Hester to the said Amos Philips, assignee as aforesaid, and the same has been allowed; that the said Ezekiel C. Howell has also presented his claim against the said John D. Hester for allowance, being the same debt to secure the payment of which, the aforesaid mortgage was given, and the said claim has been allowed, as the petitioner is informed, and believes, so far forth as the same is not satisfied by the proceeds of the sale of the said mortgaged premises; that the estate of the said John D. Hester, in the hands of the said assignee, is entirely inadequate and insufficient to satisfy the claims of the first class of creditors named in the said assignment; that the petitioner is by far the heaviest creditor named in the said first class, and is in truth and in fact entitled to nearly the whole of the funds in the hands of the said assignee, after paying the dividend of the said Ezekiel

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well thereout; that by reason of the great sacrifice of the mortgaged premises at the said sale, the said Ezekiel C. is entitled to draw a much larger dividend and share of the said John D. Hester, in the hands of the assignee, than he would have been, had the said premises been sold at a fair price—to the great prejudice of the petitioner, administratrix as aforesaid, and of the estate of the said Jacob C. Hester, deceased; that the said sale is prejudicial as well to the interests of the said Ezekiel C. Howell as of the petitioner, administratrix as aforesaid, unless, as she suspects the truth to be, there is some secret arrangement between the said Ezekiel C. Howell and his brother who became the purchaser, by which the said complainant is to be indemnified and saved harmless from all loss upon his mortgage debt by reason of said sale; that she hath by her agent applied to the said Jacob C. Howell to give up his bid aforesaid, and to permit a fair sale of the premises to be made, which he refuses to do, unless he is to receive therefor at the rate of four hundred dollars for the said lot; that she is informed and believes, and charges the truth to be, that no deed hath been made in pursuance of said sale, but that the said George T. Olmstead, sheriff as aforesaid, hath applied on the eighteenth day of October, instant, for the payment of the purchase money and the delivery of the deed to the said Ezekiel C. Howell, and that the said sheriff will then deliver the deed, unless restrained by the order of this court.

The prayer of the petition is, that the sale may be set aside, the premises may be ordered to be resold, and in the meantime the sheriff may be restrained from delivering a deed in pursuance of the sale, until the further order of the court.

On filing the petition, the following order was made.

On reading and filing the petition of Mary Hester, administratrix of Jacob Hester, deceased, one of the defendants in the cause, and the affidavit thereto annexed, it is ordered that the same be shown on the thirty-first day of October, instant, at the court-house, in the city of Trenton, at three o'clock in the afternoon.

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afternoon, why the sale made by George T. Olmstead, a sheriff of the county of Mercer, by virtue of the above execution, of the mortgaged premises therein described, not be set aside, and made null and void; and that the sheriff do desist and refrain from receiving the purchase money or delivering any deed in pursuance of said sale, until further order of this court. And it is further ordered that a copy of this order be served within five days from the date thereof upon the said sheriff and purchaser, and also upon the counsel of the complainant.

The matter came on to be heard upon the rule to show cause. Upon the hearing, the facts stated in the petition were proved. It was also admitted that the premises in question were duly advertised according to law, in a newspaper print circulating in the city of Trenton, and in five or more places in the city and vicinity, by hand-bills; that the sale was made on the day mentioned in the petition, at the house of William Snowden, inn-keeper in Warren street, in said city, that it was publicly cried in and along said street for more than an hour and a half immediately before it was struck off, that it was struck off at about four o'clock in the afternoon of the day mentioned in the petition, that the petitioner resides at the upper end of Warren street, in said city, and that her son, Isaac A. Hester, lives with her in the same house.

H. W. Green, for petitioner, in support of the rule, cited *Williamson v. Dale*, 3 John. Chan. 290; *Requa v. Paige*, 339; *Seaman v. Riggins et al.* 1 Green's Cha.

S. G. Potts, contra.

THE CHANCELLOR. The case is within the principal authorities cited. The sale must be set aside, and a new sale made, upon the payment, by the petitioner, of the expenses of the first sale, and the costs of this motion.

CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF THE STATE OF NEW-JERSEY,
APRIL TERM, 1843.

JAMES THOMPSON v. GEORGE ENGLE and others.

The court will not by injunction protect a party who has been erroneously put into possession of land under a writ of restitution, especially where his title has not been established at law.

It seems that a party has no right to a discovery, nor to the production of title deeds relating alone to his adversary's title.*

The purchasers of real estate are entitled to be heard before any decree is made impeaching the validity of the sale under which they claim title.

Where a right has been repeatedly established at law, or where the same right is subject to be controverted by different persons, a court of equity may put an end to litigation by restraining suits at law and settling the whole controversy, or if need be, by directing a single trial at law.

But the court will not interfere to quiet the possession of a party, where there has been no trial of the right at law, and where there is but one adverse claimant.

W. Halsted, for complainant.

The defendant will be required to produce the deed on which his title rests: 1 *Hopkins*, 143; 2 *Haywood*, 226; 1 *Paige*, 384; 2 *Eq. Dig.* 46.

* See *Wigram on Discovery*, sec. 31, 32; 2 *Story's Eq.* sec. 1420, note 2.

[Thompson v. Engle et al.]

Under the general prayer of the bill of complaint, the court can order the deed to be cancelled: *Mitford's Pl.* 31, 37; 5 *Vesey*, 405; *Beames' Pleas*, 314; 14 *Vesey*, 33; 1 *Russell*, 559; 17 *Vesey*, 111; 1 *Vesey and B.* 244; 14 *Vesey*, 72; 10 *Vesey*, 200.

The claim of Engle may be adjusted and settled upon this bill: 5 *Paige*, 493.

The complainant should be quieted in his possession: 9 *Cranch*, 462, 468; 2 *John. Chan.* 525; 2 *Eq. Dig.* 99, 101, 104.

The sale made by virtue of the orphans' court, should be set aside. The administrator by whom the sale was made, was interested in the purchase: 8 *Cowen*, 362; 8 *Wheaton*, 421; 5 *Vesey*, 767; 8 *Vesey*, 337, 343; 3 *Paige*, 178; 2 *Hals.* 175; 6 *Hals.* 391; *Coxe*, 16; 1 *Mod. Chan.* 91; 1 *Har. and Gill.* 61.

The order of the orphans' court, directing the sale, was obtained by fraud: *Saxton*, 260; 2 *John. Chan.* 62.

The orphans' court had no jurisdiction of the case. There were no debts to be paid: 6 *Hals.* 343.

The orphans' court have no authority to direct a sale of lands which have escheated to the state: 14 *East.* 13, 14; 1 *Black. Com.* 261; 1 *Hen. and Mun.* 85; 6 *Hals.* 1; 3 *Cranch*, 73; 12 *Wheaton*, 540; 8 *Wheaton*, 253; *Cruise's Dig.* "Escheat;" 4 *Kent's Com.* 421; *Saxton*, 518, 260; 5 *Cranch*, 173; 10 *Peters*, 449; 17 *John.* 145; 11 *Mass.* 264.

A. O. Zabriskie, for defendants. †

The jurisdiction of this court does not extend to a case where the whole question is one of title: 2 *Eq. Dig.* 28; *Jeremy's Eq.* 258; 2 *Vesey*, 122; 1 *Dess.* 109; 1 *John. Chan.* 111; 2 *Ibid.* 524; 3 *Ibid.* 302.

The court will only compel a discovery or the production of title deeds, relating to a party's own title, and not to his adversary's: *Cooper's Eq.* 58; 2 *Eq. Dig.* 49.

The decree of the orphans' court is conclusive in this court: 3 *Harr.* 73.

[Thompson v. Engle et al.]

THE CHANCELLOR. The bill in this case, presents a complicated state of facts, and seeks various kinds of relief. It relates to the estate of John G. Leake, who died in the year eighteen hundred and twenty-seven, possessed of considerable real property in the county of Bergen. This property, it was supposed, escheated to the state, from a failure of heirs capable of inheriting it, and trustees were accordingly appointed by the legislature to take it in charge. After a short time, claimants presented themselves for the lands, representing that they were the heirs at law, and entitled to the inheritance. The legislature not being able to ascertain the truth of these various applications, in the year eighteen hundred and thirty-seven, appointed commissioners, with power to investigate the subject, and with direction to the attorney general, in case they decided in favor of any applicant, to release to him all the right of the state in the lands, upon payment of the costs and expenses, which the state had paid or was liable for. By this decision, the state, and all the applicants who came before the commissioners, were, by the terms of the act, to be bound. The commissioners met and decided in favor of the complainant, as the heir at law of John G. Leake, and the attorney general released to him, accordingly, all the right and title of the state. Not being able to accommodate the bill of charges claimed by the trustees under the state, (the same not being satisfactory, as presented,) the expedient was adopted, of releasing the lands by the attorney general, subject to this claim for costs and charges, when finally ascertained. This is the position of the complainant.

John Engle, the defendant, was the acting trustee on the part of the state, for these lands, and was also administrator of the Leake estate, appointed by the orphans' court of the county of Bergen. As administrator, he obtained an order of the said orphans' court, and sold certain portions of the land to Merselis J. Merselis, and to a Mr. Townsend, which the purchasers went into possession of, and have occupied ever since. A part of Merselis's purchase he sold to Engle, subsequently, and it is alleged, upon a fraudulent contract, entered into at the time he purcha-

[Thompson v. Engle et al.]

sed. There is also a tract of seventeen acres, which the defendant, Engle, is still in possession of, claiming according to his answer, under a title adverse to the complainant's.

Upon the release made by the attorney general, of the right of the state in the Leake lands, to the complainant, he was put into possession of all of them, except such as had been sold to Merselis and Townsend, and the seventeen acre tract. The property being thus circumstanced, Engle, as the bill charges, caused suits in ejectment to be brought against the tenants of the complainant, who ignorantly suffered judgment to pass against them; but the supreme court, on application made to them, and the true state of facts being made known, ordered restitution to be made to the tenants of the complainant, of the lands which had thus been taken from them, under the ejectment suits. In making restitution, however, under the complainant's direction, they gave him the possession of the seventeen acre tract, which, in fact, had never been claimed by Engle, in the suits in the supreme court, but which he had been long in the possession of, before the suits were brought. The complainant, therefore, obtained by his motion, not only restoration of all he had lost under the ejectments, but he got the possession of another tract, entirely, the seventeen acre tract. Engle was proceeding to have this matter rectified by application to the supreme court, when the complainant filed this bill.

The object of the bill is,

1. To restrain the defendant, Engle, from further proceeding in the supreme court, to be reinstated in his possession of the seventeen acre tract.
2. To procure an inspection of the deed under which Engle claims title to the seventeen acre tract.
3. For an account of the rents and profits received by Engle, as trustee under the state, and for a settlement and discharge of his claim as trustee, against the estate.
4. That the sale made of the lands under an order of the orphans' court, may be set aside as fraudulent and void.
5. For an account for waste committed on the lands.

[Thompson v. Engle et al.]

6. That complainant may be quieted in his possession.

Without forming any favorable opinion of the course pursued by the defendant, Engle, in reference to this estate, I still think there is no propriety in the present bill. To grant relief in such a case, would violate the settled practice of the court.

The great object of the bill, no doubt, was to obtain the injunction, and thus retain the possession of the seventeen acre tract. The injunction was granted upon the *ex parte* view presented by the bill, but after further consideration and knowledge of the facts, it was dissolved. The application for the injunction was clearly wrong. The complainant had, by his writ of restitution, been placed in possession of land which had never been taken from him, and the defendant was entitled to have that matter set right.

The great difficulty in the way of the complainant is, that his title to the property is denied by the defendant, and has never been established at law. I speak now, particularly of the seventeen acre tract; nor, indeed, has he ever had the possession of it, except for a short time, under the writ of restitution. Before the complainant can call the defendant in question respecting this lot, he must establish his title at law. The act of the legislature, constituting a commission to ascertain the heirs to this estate, and the subsequent release of all the rights of the state by the attorney general, did not, necessarily, give a title to the complainant; it was nothing more than a relinquishment of the claim on the part of the state, and it was expressly provided by the act itself, it would seem, that the state and such claimants only as came before the commissioners, should be affected by their decision. It would, upon no principle, be justifiable, to bind parties not before the commissioners, nor did the legislature intend so to do. The defendant says, in his answer, that he claims the seventeen acre tract by an adverse title, and that he is in possession. If the complainant has a right to this lot, the courts of law are open to him, and he must take that course.

The prayer for the inspection of the deed, under which Engle

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claims title to the seventeen acre tract, has been complied with, without opposition, and therefore no difficulty exists on that part of the case. I must not be understood, however, as sanctioning the principle, that a party has a right to the production of deeds which relate alone to the adversary's own title. In *Cooper's Eq.* 58, it is said that the plaintiff shall have a discovery of so much as relates to his own title, and shall not pry into that of the defendant.

The release of the right of the state, can only discharge the interest in the lands from that time, and therefore I see no propriety in the complainant's having an account from Engle during the time he had the possession of the lands as trustee. After the release, the complainant had the possession, and before that, Engle acted as a trustee for the state, and as such must account to the state and not to the complainant. So also the claim of Engle for his compensation and expenses as trustee, is with the state, and must be settled in his account for the rents and profits. It is one account. On the one side, he will be charged for the rents and profits of the estate in his hands, and on the other, credited with the expenses and his compensation as trustee.

As to that part of the prayer of the bill which seeks to set aside the proceedings in the orphans' court, and a sale of a portion of the property to Merselis and to Townsend, it is a sufficient answer, that the proper parties are not before the court. Merselis is named as a defendant in the bill, but he was never brought before the court by subpoena, and at his death, which occurred since the commencement of this suit, the complainant went on without making his heirs or representatives parties. These purchasers are entitled to be heard before any decree is made impeaching the validity of the sale under which they claim title.

The last prayer asks that the complainant may be quieted in his possession. Such prayer can have no application to a case like this. Where a right has been repeatedly established at law or where the same right is subject to be controverted by a gre

[Thompson v. Eagle et al.]

many persons, a court of equity will, in some cases, put an end to strife and litigation, by restraining suits at law, and settling the whole case at once, or if need be, by directing a single trial at law. But here there has been no trial of the right at all, nor are there any other parties involved than the complainant and the defendant, Engle: 2 Story's Eq. 147.

As the complainant has not been able to satisfy me of his right to relief on the grounds on which it is sought, I must dismiss the bill, with costs.

Decree accordingly.

JOSEPH SHEPPARD V. REUBEN HUNT and others.

In the year seventeen hundred and twenty-five, a tract of land was devised for the benefit of a free school in "the township of Greenwich." In the year seventeen hundred and forty-nine, the same land was conveyed, by persons acting on behalf of the "town of Greenwich," by indenture, to D. S., reserving a yearly rent of thirteen pounds, to be paid unto the trustees for the time being, as they shall be chosen by the inhabitants of "the town of Greenwich" included within certain boundaries in the said deed particularly specified. The rent was paid for about eighty years to the trustees chosen by "the town of Greenwich." *Held*, that D. S. and those claiming under him, were bound to pay the rent reserved to the trustees chosen by the town of Greenwich, pursuant to the reservation in the said deed, and not to the inhabitants of the "township of Greenwich."

The grantee in a deed, and those claiming under him, cannot deny the binding authority of a reservation in the deed.

Long acquiescence in a given construction of an instrument, renders it unwise and impolitic to change such construction.

Public policy forbids the disturbance of rights ancient and well settled by the practice of the parties in interest.

BILL of interpleader. The case was this. Zachariah Barrow, in and by his last will and testament, bearing date on the thirtieth day of July, in the year of our Lord seventeen hundred and twenty-five, duly executed to pass real estate, gave and

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devised as follows: "Imprimis. I will that all my just and honest debts be paid which I owe to any man; then I give to my well beloved mother-in-law, Mary Field, all my farm and plantation, with dwelling-houses, out-houses, &c. during the term of her natural life. Item. It is my will that, after the decease of my mother-in-law, Mary Field, I give the said farm for the benefit of a free school for the township of Greenwich for ever."

After the death of the deviser, it appearing that he had acquired title to the said devised premises under John Fenwick, and his title appearing to be defective, the inhabitants of the town of Greenwich procured one Ebenezer Miller to procure a good title for the said premises from the proprietors of West New-Jersey, which was done. A survey of the said tract under title from the proprietors, having been made in the name of the said Ebenezer Miller, on the fourteenth day of November, seventeen hundred and forty-nine, the said Ebenezer Miller, together with Ananias Sayre and Thomas Ewing, attorneys duly constituted by the inhabitants of the town of Greenwich, conveyed the said premises, by deed of indenture bearing date on the day and year last aforesaid, unto David Sheppard, his heirs and assigns, for the consideration of five shillings, yielding and paying therefor the yearly rent of thirteen pounds, current money of New-Jersey, on the first day of December in each year, "unto the trustees for the time being, as they shall be chosen by the inhabitants of the town of Greenwich" contained in certain bounds in the said deed particularly specified; and which said yearly rents, with the arrearages thereof, were by the terms of the said deed "to be and remain for the use, benefit and maintenance of a free school to the inhabitants of the town of Greenwich, aforesaid, that are contained in the above mentioned bounds, their heirs and assigns for ever." And in case the said rent should be at any time in arrear, the trustees of the said inhabitants of the town of Greenwich, chosen for the time being, or any of them, were by the said indenture authorized and empowered to enter on the premises and distrain for the same.

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Immediately after the execution of the said deed, and by virtue thereof, the said David Sheppard entered into possession of the said premises, and he and his heirs continued to hold the said premises, and paid the rent reserved by the said deed, regularly up to the first day of December, eighteen hundred and thirty-four, to the trustees chosen by the inhabitants of the town of Greenwich, as described by the said indenture, and the same was expended for the benefit of a free school for the said inhabitants.

In the year eighteen hundred and thirteen, Joseph Sheppard, the defendant, purchased a part of the said premises, subject to the rent reserved in the said indenture; whereupon an agreement was entered into between him and the inhabitants of the said town of Greenwich, by which the portion of the said rent to be paid by the said Joseph Sheppard, was fixed at twenty-five dollars and twenty-five cents, which was paid by him annually to the said trustees, from the year eighteen hundred and thirteen up to the first of December, eighteen hundred and thirty-four.

The inhabitants of the town of Greenwich are not a body corporate in law—the township of Greenwich, as incorporated by law, embracing considerable territory not contained in the town of Greenwich as described in the said indenture. From the making of the said indenture, the inhabitants of the said town of Greenwich, as described in the said indenture, from time to time chose trustees, and maintained a free school with but little interruption; and on the twentieth of March, eighteen hundred and forty-one, they duly elected Reuben Hunt and four others trustees of the said inhabitants. The said Joseph Sheppard having refused to pay the rent in arrear, the trustees so elected there, by a vote of the inhabitants, instructed to file a bill in chancery for the recovery of the said rents. Accordingly, on the twenty-fourth of February, eighteen hundred and forty-two, a bill was filed in this court by the said Reuben Hunt, Enoch Fulford, David Jones, Samuel C. Fithian and Charles B. Fithian, (the trustees so elected as aforesaid,) on behalf of them

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selves and all other the inhabitants of the town of Greenwich, against the said Joseph Sheppard, for the recovery of the said rent in arrears, setting forth substantially the above related facts.

On the thirteenth of July, eighteen hundred and forty-two, the said Joseph Sheppard filed a bill of interpleader against the complainants in the original bill, and against the inhabitants of the township of Greenwich, in the county of Cumberland. The bill of interpleader states, among other things, that the premises were conveyed to the complainant with a covenant of warranty against all claims "except the annual or yearly annuity, right or demand, which the township of Greenwich hath on the premises for ever;" that the complainant, from the time of the said conveyance, paid the said yearly rent of twenty-five dollars and twenty-five cents to the inhabitants of the *township* of Greenwich; that he continued such payments until he was notified that payments to the township of Greenwich would be contested, and that the complainant would be held responsible for the whole of said rent to the inhabitants of the town of Greenwich; that he is ready and willing to pay the said rent, but both of the said parties persisting in their claims, and the complainant being wholly ignorant to whom the said rents rightfully belonged, could not with safety pay either, until the rights of the claimants were settled by a competent tribunal; that by an act of the legislature of the state of New-Jersey, passed the nineteenth of January, A. D. seventeen hundred and forty-seven, the county of Cumberland was set off from the southern part of the county of Salem; and in and by the said act the township of Greenwich was incorporated, and the boundaries thereof particularly defined; the said boundaries, as described by the said act, being much more extensive, and embracing a greater number of inhabitants, than the town of Greenwich as defined in the said indenture to David Sheppard.

An answer was filed to the bill of interpleader, by the complainants in the original bill, in which, among other things, they state, that they have reason to believe that the boundari

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of the township of Greenwich, at the date of the said devise by the said Zechariah Barrow, were different from the boundaries of said township as prescribed in the act creating the county of Cumberland, but that they were unable with certainty to ascertain the same; they deny that the said Zachariah Barrow had any title to the said premises, and insist that the inhabitants of the town of Greenwich acquired title from the council of proprietors; that by the conveyance to the said David Sheppard, the rent was reserved to the inhabitants of the town of Greenwich, as described in the said deed, and that the said conveyance and reservation were acquiesced in for nearly a century; they deny that the said rent was ever paid to the inhabitants of the township of Greenwich, but insist that it was always paid to the trustees chosen by the inhabitants of the town of Greenwich, in accordance with the reservation in the said deed, or to others with their assent and concurrence. They allege that the township of Greenwich have in fact abandoned all claim to the said rents; that the said Joseph Sheppard is himself the party in interest, and has set up the claim on behalf of the inhabitants of the township of Greenwich, to defeat the just claim of the defendants to the said rents.

The cause was heard upon the bill of interpleader, answer, replication and proofs.

R. P. Thompson, for complainant.

At the April term of this court, eighteen hundred and forty-two, a suit was commenced by Reuben Hunt and others, against Joseph Sheppard, the above complainant, to enforce the payment of certain rents to which the complainants in that suit alleged themselves to be entitled. These rents had been a source of dispute and controversy between the "town of Greenwich" and the "township of Greenwich," in Cumberland county; both parties claiming the right to receive them, and each insisting that Sheppard, the present complainant, should pay to them.

By the records of the township, it appears that from eighteen

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hundred and nine to eighteen hundred and thirty-two, the town meeting disposed of these rents of the town place, in the building of a school and town house, and for the purposes of education in the township.

In some of the years, the rent was paid to the trustees for the "town," and in others to the "school committee of the township," but no dispute appears to have arisen until the year eighteen hundred and thirty-one, when there is found an order of the township meeting "that the school committee be authorized to call upon the person who has possession of the papers respecting the town place belonging to the township, and request them for the township." In eighteen hundred and thirty-two, at the township meeting, the town clerk is directed to take charge of these papers for the township. In eighteen hundred and thirty-five, at the township meeting, a resolution was passed "that the collector of the township is authorized to receive the money arising from the town place."

In eighteen hundred and thirty-six, at the annual township meeting, a preamble and resolutions were adopted, affirming the rights of the township to these rents, and again asserting the authority of the collector of the township to receive them.

At the same meeting a resolution is passed "that all the papers relative to the property, be presented to the governor of this state, and obtain his opinion to whom the yearly rents of said property, in justice and equity belong." The committee appointed waited on the governor, who declined to give any opinion.

In eighteen hundred and thirty-nine, the township meeting authorize the clerk to call on Joseph Sheppard and Benjamin Tyler for the sum due for the township place, and if they refuse to pay, that the clerk be directed to prosecute them.

In consequence of the state of facts exhibited by the record above referred to, Joseph Sheppard refused to pay, after eighteen hundred and thirty-six, until the matter could be legally settled, and the proper person to whom he might pay, should be ascertained.

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The matter continued to be disputed between the parties until the year eighteen hundred and forty-two, when the suit was brought in this court.

Joseph Sheppard being thus sued by those who represented the "town of Greenwich," was advised by counsel, that his proper and safe course was to file a bill of interpleader, and thus to seek the opinion of this honorable court to which of the contending claimants he could with safety, and according to law, pay the rent due.

The complainant made the representatives of the "town" and "the inhabitants of the township of Greenwich" both defendants. The former only have answered his bill.

What is the proper office of a bill of interpleader?

This bill is preferred where two persons claim of a third the same debt or the same duty, as if rent be demanded of a tenant by two several persons, and he be ignorant to which it is actually payable, he is entitled to protect himself against their separate claims, by exhibiting against them a bill of interpleader. *Blake's Chan.* 31; 1 *Mad. Chan.* 172; *Cooper's Equity*, 45.

The counsel of the defendants asserts, and cites authorities to prove, that the claim must be persisted in at the time the bill is filed; and then remarks "in this case the township have actually abandoned all claim to this rent." I answer, the claim has always been insisted upon, and so far from being abandoned, the proof is directly otherwise.

The only evidence of an abandonment by the township on which defendants' counsel relies, is the record of the township meeting of eighteen hundred and forty-one, March ninth, where a resolution is passed, authorizing the clerk to give up the papers to the clerk of the trustees of the town school house, and there is also a statement that a gentleman of the bar had given his opinion that the annuity could not be recovered by the township clerk.

But did the township decide that the claim they had made, and year after year insisted on, was abandoned? If so, where is the record of it? Did they ever obtain an opinion that the

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"inhabitants of the township of Greenwich" could not recover the rent? If abandoned it would have been recorded in the minutes of the township.

But if it is contended that the claim was abandoned by giving up the papers, why was not the complainant informed of it?

The counsel of the defendants, aware that this was important, and that he could not prove it, has submitted interrogatories to the complainant, one of which is this, "Was you, or was you not informed, or did you not hear after the meeting of the inhabitants of the township of Greenwich, held, &c., March, eighteen hundred and forty-one, that the said meeting had relinquished all claim to said rent," &c.?

Now the answer of the complainant to the fourth interrogatory is, "I was not present at the meeting, &c., in March, eighteen hundred and forty-one, but I was informed some time afterwards that the papers relative to the town place dispute were to be given up, but I was not informed that the claim of the township to the rents was relinquished, but on the contrary, I have always understood that the claim of the township is insisted upon, and will be maintained until the chancellor of the state shall settle the matter between the parties."

This is the proof in the cause, and shows that if any abandonment of this claim was ever made, (which is expressly denied by the complainant,) it was never made known to him; but that the claim was always asserted and insisted upon.

The defendants' counsel remarks, that no demand has been made on Sheppard; the complainant, by the township, since the town meeting of eighteen hundred and forty-one.

This can have no influence either for or against him; it was well known that he had declared his intention not to pay, and desired the parties to have it settled by a legal tribunal; a new or continued demand upon him could not have altered his determination. He expressly states in his bill, under oath, that both parties had made this claim, that he had been threatened by both with prosecution, that he proposed to submit the same to arbitration, or to the decision of some gentleman learned in the

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law. These propositions were all declined, and his only safety seemed to be to file his bill of interpleader.

A mere claim is ground for interpleader. 1 *Mud. Chan.* 173.

The complainant respectfully insists that his case is clearly one of those which it is the peculiar province of a court of equity to relieve and protect, and that the proper mode to seek that relief is by a bill of interpleader.

But it is insisted by the counsel of the defendants, that Sheppard, the complainant, does not stand indifferent.

The complainant has filed his bill in pursuance with the law, and he has verified the accuracy of his statements; he seeks relief; he discloses his difficulty; he knows not to which of these parties to pay; he but tells their mutual story, they could not tell who ought to have it, and they resolved to ask governor Vroom to tell them to which of these very parties "these rents, in justice and equity, did belong." Where is the proof of his partiality? Where his want of neutrality? He admits that he owes the money; he proffers himself ready to pay; he takes part with neither, and asks of this court its instruction.

To the complainant it can make no possible difference, who gets this money; to one of the parties he must pay it, and he cares not in the slightest degree, to whom it shall be awarded; he but asks as justice and equity to himself, that the controversies of these different parties shall not be fought at his expense.

The counsel for the defendants asks why the complainant did not make known his difficulty to the trustees, or their solicitor, when he had so fair an opportunity to do so?

I answer, that he did make known his difficulty. In answer to the sixth interrogatory, the complainant says, "I told the person who brought the letter, (of L. Q. C. Elmer, esquire, demanding the rent for the town of Greenwich,) that I had concluded not to pay any further rent until the decision of a competent tribunal had determined to which of the parties I could pay with safety. I also mentioned to him generally, the diffi-

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ulty I had in knowing to whom to pay; that both parties claimed it, and I had paid both, and I really wanted to know now I could pay with safety to myself and to my estate."

This is the proof in the case, and yet we are told by the defendants' counsel, "that they never knew he had any such reason for refusal." And whose fault is it, that they did not know? Surely, the fault of their messenger; if he was faithless or negligent, and did not report to his employer the answer he got, then it is their misfortune, not our fault.

I insist upon it, that the defendants did know he had "this ground of refusal."

The whole case proves that they knew it. What caused the stoppage in the payment of the annuity after eighteen hundred and thirty-six? I answer, the very reason which caused the resolution to ask the advice of governor Vroom, to know which party had a right to the money? These defendants could not have been ignorant of that. The very last payment of rent, in eighteen hundred and thirty-five, "up to eighteen hundred and thirty-six," was made to Reuben Hunt, one of the defendants. Can it be supposed that in eighteen hundred and thirty-seven, he did not call again for the rent? And is it at all likely that he did not know the reason he did not get it?

The complainant stopped paying in eighteen hundred and thirty-six, and ever since, this subject has been a continuous source of angry controversy, at every annual town-meeting in Greenwich.

The complainant admits, as he did in his bill of interpleader, that there remains in his hands all the rents since the twenty-fifth day of March, A. D. eighteen hundred and thirty-six; and calculated to March twenty-fifth, eighteen hundred and forty-two, six years, without interest, they amount to one hundred and fifty-one dollars and fifty cents, which sum he is ready and willing to pay, according to the opinion of this honorable court.

In relation to the argument of defendants' counsel, as to the title of the town or the rights of the township, I have nothing to say; the complainant has nothing to do with that question,

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it is wholly a controversy between the "town" and "township." The bill of interpleader was filed, that they might appear and make known their rights, and if "the township" do not choose to do so, it is not to affect the complainant; his rights are made known and he feels confident they will be sustained.

The complainant respectfully insists that the costs attending the original bill, as well as the costs of the bill of interpleader, should be deducted out of the fund in court; he protests most earnestly, that he should not be compelled to pay them; he has not been guilty of laches; the disputes of the parties placed him in a position where prudence forbade his paying the rents until the proper payee was settled by legal decision.

Plaintiff is entitled to his costs out of the fund in court, on a bill of interpleader: 16 *Vesey*, 204; 9 *Ibid*, 168; *Cooper's Eq.* 49; 1 *Harr. Chan.* 117.

L. Q. C. Elmer, for defendants.

The bill of interpleader has been improperly filed; there is no case for such a bill, and of course, therefore, it should be dismissed with costs.

A bill of interpleader is exhibited where two or more persons claim a debt, &c. from the plaintiff, by different or separate interests; and where the plaintiff can only protect himself in this way, from conflicting claims: *Story's Eq. Plead.* 237.

It is likened to a bill filed by an executor or trustee, to obtain the direction of the court: *Angell v. Hadden*, 16 *Vesey, jr.* 203.

Of course there must be substantial ground for it; such a real conflict or difficulty, at least, as to raise a real doubt in the court or in the counsel, and not the mere pretence of a claim. And the opposing claims must be persisted in at the time of the bill filed. All the cases show or imply this.

Duke of Bolton v. Williams, 4 *Brown, Chan. R.* 297; 15 *Vesey*, 244; 16 *Vesey*, 203; *Cooper's Chan. Cases*, 49, 56; *Atkinson v. Manks*, 1 *Cowen*, 691; *Richards v. Salter*, 6 *John. Chan. R.* 445; 4 *Paige, R.* 384.

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In this case, the township have actually abandoned all claim to this rent.

And Sheppard knew this; by his answer to interrogatory fourth, it would seem, indeed, that he affects not to understand that the town-meeting, by ordering the papers to be returned to the trustees of the "town," did thereby mean to abandon their claim to the rent. But that such was the meaning, is evident, from the whole transaction.

He says, in that answer, that he has always understood, that the claim of the township is insisted upon, and will be maintained, &c. But from whom, or how he so understood does not appear. There is no proof of any such intention. The official proceedings show the contrary.

It appears that no demand has been made on him, by the township, since the town-meeting in March, eighteen hundred and forty-one.

In fact, the township has never formally claimed this rent of him, nor forbidden him to pay the town.

At the most, the township, when the town, after acquiescing a few years, at the commencement of the public-school law, in the receipt of the money by the township, for the first time that they did so receive it, withdrew that acquiescence and received the rent for the exclusive use of the town, took measures to ascertain whether the township had a good claim, and finding they had not, they gave it up, or at any rate do not prosecute it, or threaten to prosecute it, or interfere with it.

Sheppard never offered to pay the rent upon an indemnity, nor to refer the question (as he alleges) to counsel; and when informed by the solicitor of the trustees, that eminent counsel had given an opinion that they could collect the rent by a bill in this court, he makes no reply or offer on the subject, but contents himself, as he states in answer to interrogatory sixth, with telling the person who casually carried the letter, that he did not know to which party he ought to pay it. Why did he not make known his difficulty to the trustees, or their solicitor, when he had so fair an opportunity to do so? They never heard of his

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reply to the person who delivered the letter; nor, so far as appears, did he wish they should. In fact, they never knew that he had any such reason for refusal, supposing then, as now, that he thought he could evade payment altogether.

To allow a party who acknowledges he owes a debt, to interpose an interpleader, because some other party once claimed that debt, when the claim was abandoned or not persisted in; and especially, in a case where the pretended adverse claim never had even a colorable foundation in law or equity, and where no respectable counsel are even alleged to have sanctioned such claim, or advised that the party was even in danger from it, would be to allow the bill of interpleader to be grossly abused.

The bill of interpleader is not favored: 1 *Mad. Chan.* 148.

And it is evident, that Sheppard does not stand indifferent:

2 *Vesey*, 311; and *Story, Eq. Plend.* 238, note 3.

I do not charge collusion with the township, for the township has not countenanced this proceeding; but I do charge, that it is evident from the frame of the bill, and from the answers to interrogatories, that Sheppard does not stand indifferent; does not use the bill of interpleader so much to protect himself from two adverse claims, as for a defence against our bill, by setting up a right in somebody else, which is not the proper office of interpleader.

It is plain that the township has no colorable claim to this rent. The rent is not payable to the township, by the deed. Barrow did not devise the rent to the township, but the farm itself. If the township has any claim, it is to the farm.

But the township has no claim, either to the rent or the farm. If they ever had, time has barred it. The town received the rent without dispute, from seventeen hundred and forty-nine to eighteen hundred and thirty. And the receipt of it from eighteen hundred and thirty to eighteen hundred and thirty-four, by the township, was not adverse to the town, but by its acquiescence.

It is plain that the township never claimed this rent until

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recently. Their records from seventeen hundred and fifty-two till eighteen hundred and nine, contain no notice of it.

And in eighteen hundred and nine and eighteen hundred and eleven, the right of the town to it was acknowledged by the township.

It is believed that the township, at the time Barrow made his will, either had no defined limits, which is probable, (see act establishing township of Fairfield, *Spic. and Leam.* 556,) or that the limits were the same as those defined in the deed.

It will be noticed, that the will was made in seventeen hundred and twenty-five; the deed to David Sheppard, in seventeen hundred and forty-nine; the act establishing the township of Greenwich, in seventeen hundred and forty-seven, just before the making the deed, and after the will; and this, no doubt, occasioned the insertion in the deed of a limited territory.

This act of seventeen hundred and forty-seven, set off Cumberland county from Salem. The bounds of the townships in Salem, prior to this, are not to be found in any law or record extant. Indeed, the limits of all the townships in Salem county, remain to this day unknown, except as they are defined by usage and tradition.

Whatever may have been the reason for reserving the rent to the trustees of certain defined limits, and not to the township, it was so done, and was never questioned for more than eighty years, from seventeen hundred and forty-nine to eighteen hundred and thirty. It is too late to disturb it now, or even to inquire into the reason of it; and certainly, Joseph Sheppard cannot disturb, holding as he does, under this title.

Besides, Barrow had no title to this land. The town actually purchased it anew, and got a title for it, under which it is now held.

It is matter of history, that Fenwick established a manor at Greenwich, and granted land there; and that all his grants in New-Jersey were afterwards repudiated by the proprietors; those in Salem town, being confirmed by a special law: *Spic. and Leam.* 461.

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If a survey was ever made by Fenwick, it was never recorded.

The act of seventeen hundred and nineteen, (*Rev. Laws*, 17, *sec.* 11,) avoids all surveys not duly recorded: *Den. v. Sharp*, 4 *Wash.* 615.

But at all events, Sheppard holds under the town, and is bound, as the assignee of David Sheppard, to pay the rent to the town, and to no one else. The town is his landlord, and he cannot deny its title. Nor can he file an interpleader, in consequence of a claim (as this is) paramount to that of his landlord, but only in a case where the conflict arises out of acts of the landlord himself, subsequent to the case: *Dungey v. Angove*, 2 *Vesey*, 312; *Clark v. Hyne*, 13 *Vesey*, 383; *Courtan v. Williams*, 9 *Vesey*, 107.

These cases, it is submitted, are decisive against this bill of interpleader.

If the township has a right, it is not one arising out of any act of Sheppard's landlord, the town, but one paramount; it questions the title of the town altogether.

The original bill of *Hunt and others v. Sheppard*, remaining unanswered, is to be taken as confessed, and complainant is entitled to a decree referring it to a master to ascertain the rent in arrear.

Both parties, it is supposed, wish the matter finally disposed of. Every thing now appears that can hereafter.

Even where the bill of interpleader is proper, the court will make a final decree, where the case is ripe for it: *Angel v. Hadden*, 16 *Vesey*, 203.

The defendant, by his pretended bill of interpleader, confesses his liability to pay the rent; and not having answered the bill, nor shown any good excuse for requiring to be sued, he ought to pay it with costs.

A bill in this court is the proper remedy.

No suit at law can be sustained by the trustees, the inhabitants of the town not being incorporated. No such thing is known in law, as a right devolving upon the inhabitants of a

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particular district of country ; they cannot claim as heirs or representatives, or legal successors of those who lived in the same district at a prior time.

Although there is, strictly speaking, no proper grant of this rent, yet this grant took effect upon the principle of a grant or dedication to public or charitable uses, as explained by judge Story, in the case of the *Town of Pawlet v. Clark*, 9 *Cranch*, 331.

The case of *Beatty and others v. Kurtz and others*, 2 *Pa. R.* 566, fully sustains this case.

The statute of Elizabeth, and some subsequent statutes, under the authority of which the English court of chancery usually proceeds in dealing with charities, is not in force in New-Jersey ; nor was it in Maryland, by the laws of which the case of *Beatty v. Kurtz*, was decided. But the courts of equity in England, and in this country, have always favored charities, and upheld them by virtue of their general authority to afford relief in all cases where it cannot be had by law.

The jurisdiction of the court to enforce rents, in all cases where there is any difficulty at law, appears to be well established : 1 *Mud. Chan.* 25 ; 2 *Vernon*, 359 ; *Holden v. Chambers*, 3 *Peere Wms.* 256 ; *Duke of Leeds v. Radnor*, 2 *Brown, C. R.* 518.

As it is admitted that the rent has been paid up to March twenty-fifth, eighteen hundred and thirty-six, and none since ; if the chancellor shall be of opinion that the complainants, Hunt and others, are entitled to a decree, the amount can be ascertained by consent, without the expense of a reference.

THE CHANCELLOR. By the will of Zachariah Barrow, in seventeen hundred and twenty-five, the farm in question, after a life estate to Mrs. Field, was devised to the township of Greenwich, for the support of a free school. By the recitals in the deed of seventeen hundred and forty-nine, from Ebenezer Miller, Ananias Sayre and Thomas Ewing, to David Sheppard, it seems doubts were entertained as to the title of Barrow to the

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farm, and these gentlemen were appointed by the inhabitants of the township of Greenwich, to take such measures as might be necessary, "for the strengthening and securing the title of the said lands to and for the uses above mentioned." The grantors in this deed, after acquiring a fresh title, made this conveyance, reserving an annul rent of thirteen pounds, unto "the trustees, for the time being, as they should be chosen by the inhabitants of the town of Greenwich, "included within certain boundaries therein described." The question presented is, shall the rent reserved be paid to the trustees appointed by the inhabitants of the town of Greenwich, living within said boundaries, or to the township of Greenwich at large, and its proper officers.

It is obvious that Barrow, the testator, designed his bounty for the township at large, and that the grantors in the deed were appointed by, and were to act for the township at large. The trusts in the will are referred to in the deed, and that instrument, on its face, shows that the grantors meant to perfect the title to the land, to carry out the benevolent designs of the testator. The word town is used, it is true, instead of township, but they were designed as the same. In truth, it is very common now to call a township by the name of a town. As it is presumable the grantors in this deed acted honestly, and designed no wrong, it would be difficult to explain their conduct, but for the suggestion, that at the time this deed was made, or at all events, when the will was executed, the boundaries of the township of Greenwich did not extend beyond those given in this deed, and if so, the restriction left the trust exactly as it was left by the will of Barrow, to the township at large. They possibly designed that any subsequent enlargement of the boundaries of the township, should not affect this property. *Ex aequo et bono*, therefore, it would seem the township, when it came subsequently to be enlarged, had a claim to this rent, and I have little doubt, to have given it that direction would have been wise and prudent.

But I am to decide on the rights of parties as the case stands,

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and I see no way of avoiding the payment of the rent according to the express reservation in the deed.

The rent is reserved by the deed, and not by the will of Barrow. The will devised the land, and the title proving defective, other persons acquired a fresh title, and they have imposed upon the purchaser certain specified terms, which must be complied with. Especially cannot the grantee in that deed, and those claiming under him, deny its binding authority.

The long acquiescence in this construction, would render it, at this day, unwise and improper in the court, to interfere to produce any change. Public policy forbids the disturbance of so ancient and so well settled a principle, by the practice of the parties.

The case is a proper one for a bill of interpleader. The complainant found two claimants for the rent, under his deed, both having a very fair show of right. He was justified, I think, in having the question settled, before he paid any more money.

My opinion, therefore, is, that the rent in question is payable to the trustees of the town of Greenwich, appointed by the inhabitants within the bounds defined in the deed, and that the costs of this suit be paid out of the rent reserved. The complainant should pay interest on the rent reserved, after the day of payment.

Decree accordingly.

BENJAMIN BRUNDRED and others v. The PATERSON MACHINE COMPANY and others.

Upon a motion for an injunction, and the appointment of receivers, under the act, entitled, "An act to prevent frauds by incorporated companies," the primary question is, whether the corporation be insolvent or not.

If it be a balancing question, and the course of those who manage the affairs of the company appears to be upright and just, the doubt should be resolved in favor of the rights of the company.

It would be unwise and impolitic to interfere with any corporation, so long

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as they are acting with an honest purpose, unless their condition is hopeless, or their course of action such as to jeopard the interests of creditors and the public.

The mere opinions of witnesses in regard to the insolvency of a company, without referring to the facts upon which their opinions are founded, are entirely insufficient, and can never form the basis for the action of the court.

The affidavits of the complainants, made after filing the bill, are not competent to be read upon a motion for an injunction and the appointment of receivers.

BILL for an injunction, and the appointment of receivers, under the act, entitled, "An act to prevent frauds by incorporated companies." The bill is filed on behalf of the complainants and of all others the creditors of the Paterson Machine Company who shall come in and seek relief by, and contribute to the expense of this suit. It sets forth, that the Paterson Machine Company was incorporated by an act of the legislature of the state of New-Jersey, passed on the twenty-fourth day of January, eighteen hundred and thirty-seven, for the purpose of manufacturing cotton, wool, flax and silk machinery, and steam and locomotive engines. That among other things, it was by the said act of incorporation enacted, that the stock, property and concerns of the said company should be managed and conducted by five directors, being stockholders, one of whom should be president; that the capital stock of the said company should not exceed the sum of one hundred thousand dollars, which should be divided into shares of twenty-five dollars each, but as soon as the sum of twenty thousand dollars of the said capital stock should have been subscribed and paid, or satisfactorily secured to be paid, it should be lawful for the said company to commence business, and with that capital to carry it on until they should deem it expedient to extend their operations; and it was in and by the said act further enacted, that the directors should at all times keep or cause to be kept proper books of account, in which should be regularly entered all the transactions of the said corporation, which books should at all times be open to the inspection of the stockholders of the said corporation, or their legal attorney or attorneys.

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That by virtue of the said act of incorporation, the said company, on or before the first day of January, eighteen hundred and forty, went into operation, more than twenty thousand dollars of the capital stock having been paid in, and commenced their said business, and that the said company have purchased and received large amounts of personal and real property, such as are necessary and useful for the said corporation to carry on their manufacturing operations; and that the complainant, Benjamin Brundred, and the defendants, Daniel K. Allen, William Shippey, Josiah Shippey and Francis Del Hoyo, have been chosen directors, and the said four defendants are still acting as the directors of the company; and that, under and by virtue of the said act of incorporation, the company carried on business until they became insolvent and suspended their ordinary business. That the said company have become and are largely indebted to the complainants in divers sums of money, amounting, as the complainants believe, to four thousand dollars, and that Benjamin Brundred, one of the said complainants, has become liable for the said company, upon contracts entered into by him as agent for and in behalf of the said company, with diverse persons in the republic of Mexico, where the said complainant resides, and which said contracts have been forfeited by the said company, whereby the said complainant has become liable on behalf of said company to pay large sums of money on account of the said contracts; and that the said company are also, as the complainants are informed and believe, indebted to other persons in still larger sums of money.

That on the first day of October last past, or thereabouts, the said the Paterson Machine Company suspended the ordinary business of the company for want of funds to carry on the same, and from that time have neglected and refused to pay their just debts; and that the said Daniel K. Allen, William Shippey, Josiah Shippey and Francis Del Hoyo, or some of them, have the custody of the books of account and effects of the said company, and that they and the said William Shippey, president of the said company, have refused the said Benjamin Brundred,

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One of the stockholders and directors of the said corporation, or his legal attorney, permission to inspect the said books, although requested so to do, and have refused to give full information of the true condition and situation of the said company; and as the complainants have heard and verily believe, and they charge that the said the Paterson Machine Company are insolvent, and unable to pay their just debts, and have no hope or expectation of ever being able to pay all their just debts, or of again resuming their ordinary business. That the said company have been prosecuted in several suits, for moneys due by them to the creditors of the said company, and that judgments are about to be obtained against said company, in the circuit court of the county of Passaic, at the next term thereof, which is to be in a few days. That the said Daniel K. Allen, William Shippey, Josiah Shippey and Francis Del Hoyo, have combined to defraud the complainants, and to prevent the collection of the moneys due to them respectively, by making a fraudulent transfer and sale of the assets of the said company to themselves, or some of them, and under pretence of such sales and transfer, conveying the said assets of the company beyond the jurisdiction of this court.

That the said Daniel K. Allen, William Shippey, Josiah Shippey and Francis Del Hoyo, acting as directors of said company, allege and pretend that they have within thirty days last past, sold and assigned all the personal property and assets of the said company, to the said Francis Del Hoyo, excepting thereout the tools and implements and such machinery as is necessary to do the work heretofore done by the company, the property so sold amounting in value to the sum of twelve thousand dollars, or thereabouts; and they or some of them also pretend that the said defendants, so acting as directors of said company, have leased the real estate of said company, including the machine shop, foundry, brass shop, blacksmith shop, and also the tools, implements and machinery of said company, including all not so conveyed away by the said company, as aforesaid, to the said Daniel K. Allen and William Shippey, for

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a long time, but for how long the complainants are unable to state; and the complainants charge that these acts, if they have been done, were done with the avowed intention of discontinuing the business of the said company for want of funds to carry it on, and also for the purpose, as the complainants believe, of preventing the creditors of said company collecting their debts, and also with a full knowledge on the part of all the parties thereto of the insolvency of the company, and of the suspension of their ordinary business for want of funds to carry it on.

That in pursuance of such fraudulent sale and transfer of the said property to the said Francis Del Hoyo, he, in connection with the other defendants above named, have been carrying a part of the machinery belonging to the said company, to the city of New-York, and that at least one throstle and several carding machines, of the value of seventeen hundred dollars, have been so conveyed away, and they, the defendants, are about to carry the remainder so purchased, or pretended to be purchased, to the city of New-York, and from there to some other parts, to the complainants unknown; and the complainants have been informed and believe, that the vessel that is to carry the same away, is to sail in a few days from the city of New-York, and that the actings and doings of the defendants are contrary to equity and good conscience.

The prayer of the bill is, that the complainants, and other creditors of the said company who may come in as parties and contribute to carrying on this suit, may be paid what is justly due to them; that the said company, their officers and agents, may be enjoined from receiving any debts due to the said corporation, and from making any sales or transfers of the assets of the said company to themselves or to any other person, and from conveying the said assets, or property of the said corporation, or any property that belonged to the said company, and which has been leased or transferred, or pretended so to be, to the said defendants, or any of them, beyond the jurisdiction of this court, and from exercising any of the franchises or privileges granted by the said act of incorporation; and that a recei-

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ver or receivers or trustee may be appointed, with power and authority to sue for, collect, receive and take into possession, all the goods, chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description, belonging to said company at the time of their suspending business as aforesaid, and to sell, convey and assign all the real and personal estate of the said company, and to bring into this court all the moneys and securities for moneys arising from such sales, or which the said receiver or receivers or trustee shall collect or receive by virtue of the authority vested in them.

The bill was filed on the twenty-sixth day of January, eighteen hundred and forty-three. On filing the bill an injunction issued, as prayed for, except that it was so qualified as not to prevent the running of the machinery, nor the payment of the operatives. Notice was at the same time given of an application for a full injunction, and for the appointment of receivers, on the tenth day of February, then next, which was subsequently postponed to the tenth of March.

On the sixth day of March, joint and several answers were filed in the name and under the seal of the Paterson Machine Company, and by the four defendants, Daniel K. Allen, Josiah Shippey, William Shippey, and Francis Del Hoyo. The answer admits the grant of the charter, and the organization of the company, as charged in the bill of complaint, and that they went into operation about the fifth of June, eighteen hundred and thirty-seven, with a capital of twenty-five thousand dollars. States that they have purchased a large and valuable lot near the centre of the town of Paterson, upon which were erected extensive and costly edifices and works for carrying on the machine-making business; that they have provided, at great expense, a steam engine, gearing and apparatus, a foundry, shops and tools, necessary and useful for carrying on the manufacture of machinery authorized by the act of incorpora-



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tion, and that they commenced and have continued a profitable business therein, and that from time to time they have purchased more lots, and have enlarged their establishment, and have applied and used large sums of money in making valuable additions and improvements.

The answer further states, that the capital stock of the said company is owned, in equal shares, by the complainant, Benjamin Brundred, and by the defendants, D. K. A., J. S. and F. D. H., excepting four shares, which are in the name of the defendant, W. S.; that the said five persons are the directors; that W. S. is the president, and J. S. the secretary of the said company. Admits debts due from the company to the complainants, excepting Benjamin Brundred, exceeding eight hundred dollars, and alleges that the whole amount of indebtedness to their hands and workmen does not now exceed two thousand five hundred dollars. Denies that the complainant, Benjamin Brundred, is a creditor of the company, or that he has any valid claims against them for damages for the non-fulfilment, on their part, of contracts made by him on behalf of the company, and alleges that the said Benjamin Brundred is in fact a debtor of the company to a large amount. Denies that any of the complainants have commenced suits at law against them for their alleged demands, and states that the suits which have been commenced against them, as charged in the bill of complaint, were instituted principally by creditors residing out of the state. Alleges that the directors of the company have at all times caused proper books of account to be kept, according to the requirements of the act of incorporation, and that the said books have at all times been kept open for the inspection of the stockholders and their attorneys. Denies that the said Benjamin Brundred, or any person claiming to be his attorney, has ever been refused permission to inspect the said books.

Denies that the company are insolvent, or that they suspended business for want of funds to carry on the same, or that they have no hopes or expectation of again resuming their ordinary business. Alleges that a large part of the business of the com-

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pany has been the manufacture of machinery to fill orders for Mexico; that such business has been very profitable, and has enabled them to employ a large number of hands, and to manufacture a great quantity of materials; that relying on a continuance of that market, they kept their works in full operation during the winter and spring, but that owing to the difficulties in that country, the orders for machinery did not equal the expectations of the defendants; that owing to the depressed state of business in this country, and the dulness of the market, the directors, feeling unwilling that a larger stock of machinery and materials should accumulate on their hands, from motives of prudence, about the twenty-first of May last, determined to stop the works, intending to put them in operation again as soon as they could find a market for their machinery; that little or no manufacturing has been done by them since that date, and that they have not been able to make sale of their manufactured machinery, except as hereafter mentioned.

Denies that any fraudulent sale or transfer of the assets of the company has been made, or any attempt to transfer the assets or property of the company beyond the jurisdiction of the court. States that the company being unable to make sale of their manufactured machinery, and perceiving that their works were sustaining injury from want of use, on the nineteenth of January, eighteen hundred and forty-three, the directors, upon mature reflection, determined it would be for the interest of the creditors and stockholders of the company to accept of a proposition of D. K. A. and W. S., two of the defendants, for the purchase of the finished and unfinished stock, and a lease of the establishment, for the sum of fifteen thousand dollars; and the company accordingly, on that day, sold and transferred to them all their finished and unfinished machinery, and all their raw materials and stock on hand, and did demise and lease to them all their real estate, machinery, apparatus, tools and patterns for making machinery, and the right to use all the patent rights which the company had the right of using, subject to all the rights of the said Del Hoyo as mortgagee of the said

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premises. Alleges that the said sale and lease were not made for the purpose of preventing the creditors of the company from collecting their debts, or with the knowledge or belief that the company was insolvent, but in good faith, and for the benefit of the creditors; that the entire consideration was to be applied to the payment of the debts of the company, and that the arrangement was made that the company might be sooner enabled to discharge its indebtedness; and the defendants believe that the assets and property of the company, if prudently managed, are much more than sufficient to pay all their debts.

The defendants, D. K. A. and W. S., in answering, say, that they considered that the aforesaid arrangement would enure to the benefit of the creditors and stockholders of the company; that after the arrangement was made, these defendants reorganized the machine shop and the works connected therewith, and that at the time of the service of the injunction issued in this cause, they had set all the works in operation; that they had sold a part of the finished machinery to Francis Del Hoyo, one of the defendants, for adequate prices, and that the removal thereof to the city of New-York, was in good faith, in the ordinary course of their business, and without any design of fraudulently removing the property beyond the jurisdiction of the court, or of defrauding the complainants or any of the creditors of the said company.

That if the company had suspended business on account of insolvency, or had not expected to continue their operations, the directors had power, by virtue of the charter, to dissolve the company, and thereupon, by virtue thereof, the directors would have become trustees for settling all the affairs of the company; unless the stockholders had appointed other persons for that purpose.

That the company own, in fee, very valuable real estate for carrying on their business, which cost originally at least forty thousand dollars; that the original purchase money remaining on mortgage is six thousand nine hundred and seventy-five dollars; that the steam engine and machinery upon the said pre-

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males cost over thirty thousand dollars; that they are of the best quality, and in good order; and that on the eighth of July, eighteen hundred and forty-one, they were mortgaged, together with the real estate of the company, to the defendant, Del Hoyo, for twelve thousand eight hundred dollars, lent and advanced by him to the company.

Admits that the personal property sold by the company to the defendants, D. K. A. and W. S., may be worth twelve thousand dollars, as stated in the complainants' bill. States that the debts due to the company amount to over four thousand seven hundred dollars, (the greater part of which they consider good,) in addition to the said sum of fifteen thousand dollars due to them from the defendants, D. K. A. and W. S., as aforesaid, and that the defendants believe that there is a large sum of money due to the company from the complainant, Benjamin Brändred. That the whole amount of the indebtedness of the company, including the demands of Del Hoyo which are not secured, do not exceed the sum of twenty-three thousand five hundred dollars; and that the property and effects, rights and credits of the company, far exceed all their liabilities.

The answer further states, that if the injunction is continued, and the property of the company should pass into the hands of receivers to be disposed of, the defendants are satisfied that the property must be ruinously sacrificed, that the property and machinery of the company would be sold far below its value, and that the whole capital stock of the company would thus be irretrievably sunk and lost; but that if the company should be permitted to carry out their arrangements, and to conduct their business as they have designed, the defendants believe that they will be able to pay all the creditors of the company, and save the capital stock.

The matter came on to be heard before the chancellor upon the motion for an injunction, and for the appointment of receivers, at a special term at Newark, on the tenth day of March, eighteen hundred and forty-three.

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Numerous affidavits were taken previous to the argument including, among others, the affidavits of the complainants which were read upon the hearing, subject to exceptions. The affidavits of the defendants, in addition to the answer, were also read.

Scofield and *H. W. Green*, for complainants.

A. S. Pennington and *A. Whitehead*, for defendants.

THE CHANCELLOR. This bill is filed for the purpose of obtaining an injunction against the Paterson Machine Company, and for the appointment of receivers. The bill charges the company to have become insolvent, and to have suspended business for want of funds to carry it on. The complainants are, one stockholder to the amount of one quarter of the whole stock, and sundry creditors, who have claims to the amount of two or three thousand dollars, as they allege, for their work and labor; the parties who are made defendants, are the corporation and its directors. The defendants have answered by a joint and several answer, and it is denied on the part of the corporation, that the company is insolvent, or that they suspended business for want of funds, but that from motives of prudence alone, on or about the twenty-first of May last, they stopped their works for a time, intending to set them in motion again as soon as fresh orders and a new demand for their manufactures should justify it. This being the answer of the corporation alone, is not under oath, but under the seal of the company. On this part of the case, the remaining defendants answer, that they believe the assets and property of the company, if prudently managed, are much more than sufficient to pay all its debts. Thus it appears upon the pleadings, there is a wide difference between the parties.

The proceedings are founded on the act of eighteenth of February, eighteen hundred and twenty-nine, entitled "An act to prevent frauds by incorporated companies," and the bill must be

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maintained under the provisions of that act, or the suit fails. There are other matters introduced incidentally, but it is by force of this act alone, that the complainants by their bill can have the aid of this court.

Whether this corporation be insolvent or not, is the primary and all important question, and this must ever be a delicate matter to settle. Many of the witnesses examined to the point, express nothing more than an opinion on the subject, without referring to any facts from which such opinion is formed. Such evidence is entirely insufficient, and can never form the basis of the action of the court. The facts must be examined, and an estimate of the actual condition of the company ascertained. If it be a balancing question, and the course of those who manage its affairs appears to be upright and just, the doubt should be resolved in favor of the rights of the company. It would be unwise, and against public policy, to seek an occasion for interference with any corporation, so long as they are striving against adversity with an honest purpose, unless their case is hopeless, or their course of action so unfair as to jeopardize the interests of creditors and the public.

I have felt it to be an incumbent duty, in investigating this case, to look at the condition of the company with a liberal eye, and if possible not to interfere with its concerns. I had hoped the evidence would have justified me in not interposing; but I am constrained to come to a different conclusion. This conclusion is forced upon me, more by the course taken by the directors and managers in reference to the affairs of the company, than from the situation of the property as it originally stood.

The charter for this company was obtained on the twenty-fourth of January, eighteen hundred and twenty-seven, with a capital not to exceed one hundred thousand dollars, and with power to commence business as soon as twenty thousand dollars should be subscribed and paid, or satisfactorily secured. The stock is now held by five persons, who are also the directors. In fact, four persons hold it in equal parts, except four shares, which are transferred to a fifth individual, the act requiring five

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directors, all of whom must be stockholders. The amount of stock subscribed is twenty-five thousand dollars, which at twenty-five dollars a share, gives one thousand shares.

The property of the company consists of a valuable real estate in the town of Paterson, with buildings, machinery and appendages, suited to the business conducted by the company; a quantity of finished and unfinished manufactured articles, and assets to the amount of about four thousand dollars. The indebtedness of the company is about forty-three thousand dollars, of which, not far from twenty thousand dollars is secured by mortgage on the real estate. The only possible question arises upon the value to be placed on the real estate, machinery and fixtures. Are they worth more than the twenty thousand dollars, for which they are mortgaged? The evidence here is very defective, and it is impossible, from the meagre testimony on the subject, to arrive at any very accurate conclusion. There should have been estimates made of its present value by competent judges. The defendants do not state the value of the real estate at this time, but say it cost about forty thousand dollars. Nothing can be more unsatisfactory than to judge of the present value of real estate and improvements, by their cost a few years since. But in this case, it seems by the minutes, that the real estate was purchased by the company, of the four persons who hold the stock, and who were at the time the directors. The price for the original purchase was fixed at twenty thousand dollars, but it was, in truth, a company buying of itself, and therefore forms no test of value, even at that time. I am firmly convinced that the real estate and fixtures are covered by mortgages for as much as will ever be realized from them. It must be superadded to this estimate, that the company have leased the premises for a small rent, for five years, subject to incumbrances. If I am right in this, it decides the insolvency of the company, for the remaining property, consisting of machinery, finished and unfinished, raw material, stock on hand, and indeed all the personal property not embraced in the mortgage was sold by the company, (including the rent for five years

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mill and machinery,) at fifteen thousand dollars. This sum, with our thousand dollars of other assets, as estimated, will still (should the mortgages be paid out of the real estate) not be sufficient to liquidate the demands against the company, by several thousand dollars. Firmly as I am persuaded from these facts, that the company is insolvent, yet, had they been pursuing a steady course in business, I would not have disturbed them. But what is the course pursued? The company stopped their business in May last. The directors, or some of them, have repeatedly declared to creditors, when they asked for their pay, that the company was insolvent. The creditors have been denied payment of their debts, some have taken in payment goods at prices beyond what they could possibly realise from them, others have prosecuted suits at law, and executions are now hanging over the company in the hands of the sheriff of Passaic. With a company thus circumstanced, and with a mortgage of twenty thousand dollars upon their real estate and fixtures, the directors, who are also the owners of the stock, at a meeting held on the twelfth of January last, a short time before the filing of this bill, and at which meeting all the directors were present, (except the complainant, Benjamin Brundred,) agreed to lease the real estate for five years, and to sell all the personal property for fifteen thousand dollars, to Daniel K. Allen and Josiah Shippey, two of the directors. If this proceeding be lawful and binding, what remedy can a creditor have for his money? The real estate is mortgaged for its value, and if not, there is a lease in addition upon it, for five years, and two of the directors own all the personal property. Tolerate this proceeding, and a corporation will be the readiest and simplest form of fraud known to the business community. It will be observed, that this is dealing by the wholesale, with the property. It effectually puts it beyond the reach of any creditor, and by the very simple process of two of the directors, who represent a majority of the stock present, becoming the purchasers. It is nothing more than the directors placing all the property of the company, when pressed for debts, into the individual hands of some of its direc-

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tors. But it seems a few days after this, at another meeting of the board, held on the eighteenth of January last, Josiah Shippey, one of the purchasers, for some reason, desired to rescind the contract for purchasing the personal property, and it was done; and at a meeting of the directors on the next day the same contract which was made by the company with Daniel K. Allen and Josiah Shippey, was agreed to be made by the company, with Daniel K. Allen and William Shippey. They could thus make and unmake a contract at pleasure; they had the power in their own hands, and had only to will it, according to this doctrine, and the property would pass beyond the reach of creditors. It is curious, in this connection, to observe the terms of payment fixed between these parties. The consideration was to be paid by the directors who purchased, either in money or in the bills payable, or other outstanding debts of the company, at par value. This clause would enable the two directors who purchased the property, to buy in the debts of the company at a reduced price, and pay their own with them at par.

The directors, by this course of action, do in effect declare the company insolvent, and put it out of its power to carry on business. If it was designed to renew the business, why leave the workshops and machinery for five years? Why dispose of all the tools and implements of trade, and all the articles of manufacture in hand, whether finished or unfinished? If this company was embarrassed, the creditors were entitled to have the property applied, as far as it would go, in a fair course of liquidation.

But there is another transaction by this company, which I should not pass unnoticed. In April, eighteen hundred and forty-two, only the month preceding the date of their suspension they declare a dividend of twenty-four thousand dollars, on capital of only twenty-five thousand dollars. This was a course given to the directors themselves, for they owned all the stock. They say in their answer, that this dividend was from the profits of the concern, and that they entertained

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no idea of stopping business. But it was a most extraordinary dividend. The company owed large sums of money, and besides, they appear to have had no funds to pay with. Brundred and J. Shippey's shares of the dividend were paid by giving up and cancelling obligations which the company had against them, Del Hoyo and W. Shippey received the notes of the company for their shares, and Allen received a draft on Del Hoyo for his share, which draft Del Hoyo paid and charged the company. The result of all this was, that the company was weakened by the amount of the dividend, and the less able, by that sum, to pay its debts.

I have not looked into the affidavits made by the complainants since filing the bill, because it appears to me improper to allow them to be read. They have the opportunity at the time the bill is filed, of subjoining their affidavits, and they should do so and file them with the bill.

In view of all these facts of the case, and particularly from the position in which the directors have placed the company and its property by their own action, I see no alternative between rendering the act on this subject nugatory, and the appointment of receivers.

The order will be for a full injunction under the act, and appointment of receivers.

Order accordingly.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY,

JULY TERM, 1843.

LEWIS COMBS v. WILLIAM LITTLE.

Premises purchased at sheriff's sale and conveyed to the purchaser under a parol agreement to permit the defendant in execution to redeem, ordered to be reconveyed.

The purchaser, in addition to the price of redemption, allowed a fair compensation for his time, trouble and expenses.

If arbitrators are not sworn, the whole proceeding is utterly void.

BILL for the redemption of real estate, sold by virtue of executions against the complainant, and purchased, as the bill charges, for his benefit, and under a parol agreement that he should be permitted to redeem, upon paying the purchase money bid at the sale.

The bill charges, that the price has been paid by the complainant; prays that an account may be taken of the money so advanced, and that the defendant may be decreed to reconvey the premises to the complainant, upon the payment, by him, of the balance, if any, that may be found due to the defendant under the agreement. The bill also prays an injunction to restrain the defendant from proceeding at law to recover

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re possession of a part of the premises from the complainant.

The answer denies the complainant's right to redeem; insists that if he ever had such right, it had been either released or forfeited by the complainant; and that, if in the opinion of the court the complainant was entitled to a reconveyance, a large amount still remained due and owing from the complainant to the defendant; that the matters in difference between the parties had been submitted to arbitrators, who had awarded the sum of eight hundred and eighty-seven dollars and seventy-four cents to the defendant, to be paid by the complainant. Admits that the arbitrators were not sworn, but insists that although such omission be ground for reversal, the award is not thereby rendered void, but that the same is in equity final and conclusive between the parties.

Hearing upon bill, answer, replication and proofs.

Kroon, for complainant.

Dayton, for defendant.

Cases cited by complainant's counsel. 7 *John. Chan.* 40; *Green's Chan.* 264; 7 *Cranch*, 218; 4 *John. Chan.* 167; *Eq. Dig.* 258, "Mortgage," sec. 1, pl. 5, 19, 26.

THE CHANCELLOR. The complainant, who was a considerable land holder in the counties of Monmouth and Middlesex, became embarrassed, and his property was sold under executions issued from the courts of law and from this court. One farm, situated at Middletown, was purchased at a master's sale, in eighteen hundred and thirty-five, by Mr. Croes, who has since sold it for the price he paid for it, to the defendant. Prior to this the defendant had purchased, himself, three tracts of woodland belonging to the complainant, at a sheriff's sale. The allegation is, that all this property was purchased on behalf of the complainant, and with the understanding that he might redeem.

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it by paying what it cost the purchasers. There is a wide difference in the position of the case, as to the farm purchased by Croes, and the wood lots purchased by the defendant himself. The sales were made at different times, and by different officers, and there are facts connected with the one which do not at all belong to the other. As to the farm sold to Mr. Croes, there is no difficulty in arriving at the character of the sale. Mr. Croes having conveyed the property without covenants as to the title, is a competent, and certainly every way a reliable witness, and he states frankly that his object in buying the property was to befriend the complainant. The right to redeem was clearly agreed to. The plan was to sell off the wood and pay in that way, as far as it would go, and then the complainant was to pay off the balance, compensate Mr. Croes for his trouble, and take the land back. Trusting, as men are apt to do, in their transactions with one another, that each will perform his part faithfully, there was no time fixed when this redemption should take place, or in what manner the business should be accomplished. This answered very well for the complainant, but having paid his money, it became irksome to Mr. Croes, and worked towards him a positive injury. The course pursued by the parties since the purchase, has, I think, completely absolved Mr. Croes from all obligation in law or equity to convey any of the property purchased by him, back to the complainant. The sale to Croes was in December, eighteen hundred and thirty-five; he bought not only this farm, but other tracts, to the amount in all, of four thousand two hundred and forty dollars. The other tracts Croes gave a high price for, but this farm was sold low; the agreement was that the complainant might redeem the whole, but he passes by the other lands, and seeks to redeem this farm alone. If there was no other objection, this would be enough. He cannot, under any circumstances, be allowed to redeem a part, without the whole.

The complainant has behaved vexatiously to Croes in this business; he came into it to help the complainant, and to save his property for him, but he gave him in the first instance a

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wrong impression as to the property, leading him to believe a large tract of valuable woodland was included in it, which turned out not to be so, and afterwards kept him out of possession. In February, eighteen hundred and thirty-six, however, the complainant executed a paper to Mr. Croes, which puts an end to the whole contract for redemption. That paper declares the complainant thereafter to be only the agent of Croes in the said lands, and covenants to abandon all possession or right to possession in them. He also agrees to pay rent for the land he occupies himself, and directs his tenant on the Middletown farm (the one now in question) to consider Croes as the landlord, and yield to him the possession. After this the complainant still paid no rent, but refused to give up possession, and Croes brought suits against him, and then for the sake of peace let him remain in possession another year, upon an agreement that he might redeem it at any time within that year. He did not redeem it within this time, and Croes had finally to go with the sheriffs of Middlesex and Monmouth, (for the property lay in two counties,) and with other force, to obtain possession, and gave him fifty dollars to give it up peaceably, which he did. After all this, there is no pretence, in my opinion, on the part of the complainant, for any further right to redeem this property. He has yielded all his right, and should remain satisfied. The evidence attempting to show fraud or any misunderstanding on the part of the complainant as to this paper, is entirely unsatisfactory.

It appears further, that Croes was anxious the complainant should take the property at any time, but he never would. He had a hard bargain of it, and has received nothing in return for his kindness but trouble and vexation.

As to the wood lots, whatever might have been the original design of the defendant, the weight of evidence is clearly in favor of the complainant's right of redemption. The lots sold low, and others did not bid because it was understood they were sold for complainant's benefit. The evidence is sufficient to establish this point, without relying upon the witnesses whose

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competency is brought in question ; and it would be useless, therefore, to settle that point.

William Hawkins, William Combs, Cornelius Boice and Robert Mathews, all prove sufficient for this purpose, and even John M. Perrine, the sheriff who sold the property, and Nicholas M. Disbrow, the crier at the vendue, both say, it was their impression from what they saw and heard at the sale, that the defendant bought for the complainant.

This whole business seems to have been managed in a careless manner, and just so as to place the advantage on the side of the complainant. It is sufficient for the present purpose, however, to be satisfied, that the right of redemption of the three wood lots referred to in the bill, is with the complainant, and that he is entitled, from the evidence, to be restored to his land upon paying what shall be found due, if any thing, on settlement of accounts between him and the defendant.

From some expressions which fell from the witnesses, it would seem, that the redemption was to take place upon the defendant being paid the whole that complainant owed him, whether particularly relating to this land or not. He stepped in as his friend and bought his property, with the promise that when he was made whole for whatever complainant owed him, he should have his land again. The defendant will also be entitled to a fair compensation for his time, trouble and expense bestowed on this business. This is no more than is just and proper under the circumstances.

So far as relates to the arbitration which has taken place between these parties, it can pass for nothing, in the view which I take of this case. In that arbitration the Middletown farm was embraced, and quite probably, as suggested in the argument, from a desire on the part of the defendant to do almost any thing to get through with this tedious and unpleasant controversy. My own opinion is, that as the arbitrators were not sworn, the whole proceeding is void.

The injunction, therefore, having relation only to the ejectment brought by the defendant to recover possession of the Mid-

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oletown farm, was rightly dissolved, and that order must be confirmed. The usual reference, upon the other part of the case, must be made to a master, to state an account between the parties, in conformity with the views expressed in this opinion.

Reference to a master.

GEORGE PICKLE v. CHARITY AUBLE.

If a contract for the sale of real estate is silent as to the kind of funds in which payment is to be made, and the vendor by her conversation at the time of executing the contract justifies a belief on the part of the vendee, that specie will not be demanded, this is a sufficient excuse on the part of the vendee for not tendering specie on the day specified for the payment.

Under such circumstances, a demand of specie on the day of payment by the vendor, and a refusal on her part to allow the vendee reasonable time to procure it, will not defeat the complainant's right to a specific performance of the contract, especially after his being in possession and making improvements on the property.

Nor will the right of the vendee to a specific performance be defeated by his promise to accept a lease from the vendor, under the impression that his right to demand a deed was lost by the conduct of the vendor in demanding specie, and his inability to pay it.

BILL filed fifth of April, eighteen hundred and thirty-nine, for the specific performance of the following agreement:—

"Articles agreed upon between Charity Auble and George Pickle, both of the township of Washington, county of Morris and state of New-Jersey, this thirtieth day of December, in the year of our Lord one thousand eight hundred and thirty-seven. The said Charity Auble, for and in consideration of the sum of eighteen hundred and fifty dollars, to be paid as after mentioned, doth agree with the said George Pickle that she will well and sufficiently convey to the said George Pickle, his heirs and assigns, on or before the first day of May next ensuing, (eighteen hundred and thirty-eight,) all that tract, farm or parcel of land

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lying and being in the township of Washington, county of Morris, and state of New-Jersey, whereon the said George Pickle now lives, butted and bounded as follows: Beginning along the Lamington river, thence along the society line to Vanpelt's line, thence along said Vanpelt's line to the widow Mary Hunt's line, thence along the said widow Hunt's line to the Lamington river, thence down said river the several courses thereof to the place of beginning, containing one hundred and twenty-three acres of land, be the same more or less; and the said George Pickle doth for himself, his heirs, executors and administrators, agree with the said Charity Auble, her heirs and assigns, that on the executing of the said conveyance, he will pay to the said Charity Auble the eighteen hundred and fifty dollars purchase money, in the manner following; that is to say, first, four hundred and sixty-two dollars and fifty cents, on or before the first day of May next ensuing, (eighteen hundred and ~~thirty-eight~~) second payment of four hundred and sixty-two dollars and fifty cents, to be paid on or before the first day of May, eighteen hundred and thirty-nine; third payment of four hundred and sixty-two dollars and fifty cents, to be paid on or before the first day of May, eighteen hundred and forty; fourth and last payment of four hundred and sixty-two dollars and fifty cents, to be paid on or before the first day of May, eighteen hundred and forty-one; and it is agreed between the said parties that the said George Pickle, his heirs and assigns, may enter upon the said premises on the first day of April next, and take the profits to his own use; and lastly, for the true performance of this agreement, the said parties do bind themselves, their heirs, executors and administrators, each to the other, in the penal sum of three thousand dollars. In witness whereof, the parties have hereunto set their hands and seals, the day and year above written."

The bill, after setting out the contract, charges, that at the time of executing the agreement, the defendant, on being applied to on behalf of the complainant to know in what kind of money she would require the first payment to be made, stated

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that as she did not want the money to lie by her, she did not care about having specie, but that any good current bank bills would answer, as she wished to put it out again, or words to that effect; from which the complainant understood that the defendant would not require the payment to be made in specie, but would accept of current bank bills.

The bill further charges, that the complainant procured good current bank notes of specie-paying banks, and on the said first day of May, eighteen hundred and thirty-eight, went to the defendant and offered to pay her the same, and to perform all the covenants in the agreement on his part; that H. Hildebrand, whom she named as her agent, after he had counted about two hundred and fifty dollars, told him to stop counting, that the defendant would receive nothing but gold and silver; that if he had not that kind of money he had broken the agreement, and must give up possession and take a lease, or she would arrest him for damages. The complainant said, if they would give him till the next day he would procure the specie, which they refused; and being threatened with a suit, it was agreed between defendant and complainant that they should meet again on the tenth of May, to come to some arrangement of the matter.

That on the tenth of May the complainant went to defendant's, and requested to know what she would do. She replied, he had not tendered her the specie, and she would have nothing further to do in the business. The complainant thereupon told her if she would take the specie he would bring it to her. She told him to do as he pleased, and refused to hold any further conversation on the subject.

That on the twenty-second of May, he went to the house of defendant and took the whole amount of the first payment in specie to tender to her; inquired, and was informed she was not at home; but he believes she was, and that she kept out of the way of complainant to prevent his tendering the money.

That the complainant, on the same day, caused to be served on her a notice, that on the twenty-third of May he would ten-

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der to her four hundred and sixty-four dollars and eighty-one cents, the principal and interest of the first payment ; that on the twenty-third of May he went to her house with the money, and was informed she was not at home.

That from the thirtieth of December, eighteen hundred and thirty-seven, the complainant has been in possession of said premises, and from the first of April, eighteen hundred and thirty-eight, he has held possession under said agreement.

That after the agreement, complainant set to work to make improvements, and between that time and the first of May, eighteen hundred and thirty-eight, expended two hundred dollars in putting on said farm seven hundred and twenty-five bushels of lime, sixteen hundred yards of draining, one hundred loads of stone, and in clearing up swamps and hedges, and thereby materially raised the value of the farm. That said improvements were made with the knowledge of defendant, and without notice that she did not intend to fulfil said contract.

The bill further states, that the complainant always intended in good faith to fulfil the agreement on his part.

That as well on the said first of May, eighteen hundred and thirty-eight, as at all times since, he has been ready to pay the first installment of the purchase money mentioned in said agreement, and to secure the balance of said purchase money by mortgage on the said premises, or in any other satisfactory manner, and in all things to fulfil the said agreement on his part; has frequently offered to do so upon the defendant's conveying to him the premises in said agreement mentioned ; but that the defendant has refused to convey the said premises, and still refuses so to do, without assigning any other reason for so doing, except that the complainant did not tender her the first payment in specie, on the said first day of May.

That on the twenty-eighth day of December, eighteen hundred and thirty-eight, the complainant was notified to quit the premises on the first day of April next ensuing, that being the end of his lease, or that he would be held liable as a trespasser; and that the complainant has been informed and believes, that

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he defendant intends to commence proceedings at law, for the purpose of recovering the possession of said premises from the complainant.

The bill prays that the defendant may be decreed to convey to the complainant the said premises, in pursuance of the said articles of agreement; and that she may be restrained from proceeding at law to turn the complainant out of possession.

Upon filing the bill, the injunction was allowed and issued.

The defendant, by her answer, denies that she recollects saying that good current bank bills would answer, but alleges that she said that she wanted "good money."

That she understood there was difficulty about bank notes, as they did not pay specie. The complainant said he had put his money out pretty much in silver, and meant to have such money. She expected him to come prepared to pay specie.

Insists, that by the statute of frauds, such agreement must be in writing.

That on the first of May, eighteen hundred and twenty-eight, Henry Hildebrand attended for her; a deed was prepared, executed and acknowledged; that Hildebrand, for defendant, tendered the deed to complainant, and offered to deliver it on his making first payment; that complainant counted out in bank notes, about two hundred dollars, said it was all he had, except about forty dollars in silver, which he did not show; the defendant had no other money that day; that Hildebrand asked her if she would take such money, and she told him she wanted "good money;" and Hildebrand saying she was not obliged to take it, she declined receiving it; denies that he tendered her the amount of the first payment, or that the notes tendered were notes of specie paying banks; denies that she threatened to sue him the next day, or made any proposition about money; states that complainant said he had not specie, and did not know where to get it; and that the defendant considered the matter at an end; that the complainant then made a proposition to lease it for three years, and she agreed to rent it to him for one year; that

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complainant and defendant agreed that the sale should be given up, and that she should lease it to him for one year; Hildebrand was to prepare a lease; he made a memorandum of the terms, and they were to meet at defendant's house on the tenth of May then next; that they parted with the explicit understanding that the agreement of sale was to be given up, and that the complainant was to sign the lease; they were to meet on the tenth of May for that purpose; denies they were to meet to make any other arrangement; that on the tenth of May, Hildebrand had prepared the lease, and defendant had it ready to be delivered; that complainant and one S. R. H. came to defendant's house, staid a few minutes and went away, without saying any thing about the business they came for; she has had no further conversation with him since; denies that complainant told her that if she would take specie he would go and get it; admits that it may be true that complainant was at her house on the twenty-second and twenty-third of May, as she is induced to believe his design was to draw her into some further negotiation; denies that he ever tendered her the first payment in gold and silver; admits that complainant has continued in possession of the premises, but denies that it was under the agreement of sale; admits that on the twenty-eighth of December, eighteen hundred and thirty-eight, she served notice on complainant to give up possession on the first of April next, and alleges that he refused to give up possession on that day; denies that complainant laid out two hundred dollars on improving the place, or any thing over what it was his duty to do as tenant, in keeping the farm in tenantable repair; admits that he burnt one kiln of lime, cut wood to burn it on the premises, put part on the land and sold a part, equal to the actual expense of burning what he put on the farm, which was about equal to the value of the wood used to burn it; that he made some rails and repaired fences; cut the timber on the farm, but not more than was necessary to put the farm in tenantable repair; may have drawn off some stone, and cut some bushes; states that he had been her tenant for three years, and was bound to manage the

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in a proper and husband-like manner, according to the use of good farming; to make rails and keep up fences, to cut out bushes, draw off stones necessary to be removed, and that he did not do so, but double cropped the farm and exhausted soil, let the fences go to decay, with which she was dissatisfied; and if he put part of a kiln of lime on the place, made rails and repaired fences he had suffered to go to decay, hauled off stones, cut bushes, he did nothing more than he was bound to do within the three years, as a tenant; that on the first of May, eighteen hundred and thirty-eight, he did not mention or make any objection on account of these alleged repairs; that on the first of May, eighteen hundred and thirty-eight, complainant, or his agent, was the first to propose giving up the agreement of sale and taking a lease; that the meeting on the tenth of May was for the purpose of having the agreement cancelled, and the lease renewed, which he evaded and omitted to do.

The cause was heard upon the bill, answer, replication and depositions.

I. W. Miller, for complainant.

This bill was filed to compel the specific performance of an agreement entered into between the parties, under seal, on the twentieth day of December, A. D. eighteen hundred and thirty-eight, concerning the sale and conveyance of a certain farm.

At the time of making this agreement, the complainant was in possession of the farm as tenant under the defendant, his tenancy to expire on the first day of the then next April. By a covenant in the said agreement, it was agreed "that the complainant might enter upon the said premises on the first day of April next, and take the profits to his own use." The complainant, therefore, was in the possession of the premises under the agreement, from the first day of April, to the first day of May, A. D. eighteen hundred and thirty-eight, when a conveyance of the title was to be made.

The defendant covenanted to convey the premises to complainant on or before the first day of May, A. D. eighteen hundred

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and thirty-eight, when the complainant agrees on his part to pay the sum of four hundred and sixty-two dollars and fifty cents, being the first payment; the balance of the purchase money to be paid in three equal yearly payments, of four hundred and sixty-two dollars and fifty cents each.

The dispute between these parties, arose about the first payment to be made by the complainant. The evidence proves that on the first day of May, eighteen hundred and thirty-eight, the complainant went to the house of the defendant for the purpose of fulfilling the agreement on his part, and offered so to do, when the defendant refused to comply on her part, solely upon the ground that the first payment was not tendered in gold and silver; that the complainant was surprised by this objection, and requested time to exchange the money, which was refused to him, and the defendant thereupon declared the agreement forfeited, and attempted by means of threats to compel the complainant to give up the agreement and come under a lease; that as soon as the complainant was aware of the fact that the defendant would demand specie, he used due diligence to procure the same, and tender it to her; but she evaded his offers, and refused to receive it, upon the ground that it was not tendered on the first day of May.

The only objection made by the defendant on the first day of May having been overcome by the complainant, and the situation of the parties still being the same, there is no reason why the agreement should not be performed.

The following points are clearly and indisputably established by the pleadings and evidence in this cause.

1. That the agreement of the thirtieth day of December was fairly and honestly made between the parties.
2. That the purchase money is the full value of the land agreed to be conveyed.
3. That from the time of making the agreement it has always been the intention and wish of the complainant to fulfil the agreement, and that he undertook in good faith to perform the same on his part.

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4. That the performance on the first day of May, was prevented by a difficulty suddenly thrown in the way by the defendant.

5. That the complainant removed that difficulty as soon as it was possible for him to do so under the circumstances of the case.

6. That the demand of specie by the defendant on the first day of May was a mere pretence; it was not made to procure the specie, but for the purpose of breaking up the agreement.

We submit, therefore, that the complainant has made out a clear case for relief, unless the defence set up by the defendant is sufficient in law and equity to overcome it.

The defendant in answer, sets up two matters of defence.

1. That the complainant broke the agreement on the first day of May, by not being ready to make the first payment in specie.

2. That the agreement of the thirtieth day of December was rescinded by a parol agreement made between the parties on the first day of May.

As to the first defence, the evidence shows that the defendant put the objection altogether upon the time of payment, upon not having the specie there on the day. When complainant asks for a day to get the money, she refuses it.

When the specie was afterwards offered to her, she refuses it, upon the ground that it was not tendered on the first day of May.

As soon as the defendant and her agent discover that complainant is not prepared with the specie, they take advantage of that fact, and declare the agreement forfeited, and threaten him with an immediate arrest and damages. This threat was not made to compel a performance of the agreement, but for the purpose of inducing the complainant to abandon the contract altogether, else why not accept the complainant's offer at the time to procure the specie, or receive it when it was offered to her ten days after?

The objection to the money on the first day of May, was

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premeditated by the defendant and her agent, Hildebrand. Hildebrand says, in his evidence, that they consulted about it two weeks before, and concluded to make the objection. Yet no notice is given to the complainant. This was an undue advantage taken of the complainant.

The case and evidence shows that the complainant, for fear of surprise, had inquired of the defendant as to the kind of money she would receive, and that she waived the specie.

The defendant, in fact, admits the waiver of her right to have the specie, in her answer, when by way of demurrer she sets up the statute of frauds, and insists that it is not binding because not in writing.

We do not offer this evidence as a parol agreement to alter or amend the written agreement. Neither do we set it up as a contract relative to the sale of lands, within the meaning of the statute of frauds. But we do insist that it is competent evidence to show that the defendant consented to a certain mode and manner in which the complainant might perform this part of the written contract, and that she could not afterwards withdraw that consent to the surprise and prejudice of the complainant.

This evidence does not alter the substance of the contract. It is information or direction upon which the complainant had a right to rely and act until informed to the contrary. It is evidence to show that the defendant led the complainant into the difficulty, which she now seeks to take advantage of.

If the articles do not specify the kind of money to be paid, it may be shown that at the time the articles were entered into, it was agreed by the parties by parol that the installments should be paid in whatever money was current at the time: 1 *Yeates*, 135; 2 *Dallas*, 173; 3 *Stark's Ev.* 1054; *Warren v. Mains*, 7 *John. R.* 476.

So the time for the performance of a covenant may be waived by a parol agreement: *Fleming v. Gilbert*, 3 *John. R.* 528.

A substantial, though not a literal performance of an agree-

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ment, is sufficient, if the plaintiff by parol waived the literal performance of the condition: 3 *John. R.* 528, 531.

The court will not permit a party to take advantage of a circumstance not affecting the substance of the matter: 2 *Story's Eq.*

Time is not deemed in equity to be of the essence of the contract: 2 *Story's Eq.* 85.

The defendant, in her answer, sets up in the second place, that there was a parol agreement entered into between the parties on the first day of May, eighteen hundred and thirty-eight, by virtue of which she insists the articles of agreement were rescinded and given up.

This parol agreement, according to the defendant's answer and evidence, was nothing more than an understanding that the parties would meet at a future day and execute a written lease for the premises, when the articles were to be given up.

That agreement was never consummated, no lease has ever been executed between the parties, and the articles have not been given up.

Is not the written agreement then, according to the defendant's own evidence, still in full force? What act of either party has put an end to it? It certainly was not put an end to on the first day of May, for it was agreed, according to defendant's evidence, that the article should remain in force in the hands of Peer, until the tenth day of May. What took place on the tenth day of May? Nothing, according to the defendant's own answer.

She says that Pickle said nothing to her, or she to him, about the lease. She says the lease was in the house, but it was not produced.

Peer was not there with the article of agreement, and had no notice to be there.

The defendant has never demanded the article of Peer, or signified her consent to have it cancelled.

The articles of agreement are therefore still in full force, according to the defendant's own showing.

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But by the complainant's evidence, it appears that no such parol agreement was made on the first day of May, as set up by the defendant.

The evidence of Daniel Peer is entitled to superior credit over that of Hildebrand, the advisor and instigator of the defendant, or that of her sons and sister-in-law. He had been selected by both the parties to draw and hold the articles between them, he was there on that day to see them executed, he heard all that passed, and is an indifferent witness between the parties.

But if your excellency should be of opinion that a parol agreement has been proven,

We then insist that no parol executory agreement will rescind or destroy an agreement in writing under seal, relative to the sale of lands: 3 *Starkie's Evidence*, part 4, 1050; 9 *Modern*, 302; 2 *Atkyns*, 384; 6 *Mass.* 24; 6 *Hals.* 174; 3 *Green* 116; 3 *Wils.* 275; 13 *Wendell*, 71; 2 *Wils.* 86; 1 *Phillips' Evidence*, 563.

A parol discharge of a written agreement may in some cases be admitted as a defence to a specific performance, under the following rules, which may be collected from all the cases.

1. The parol agreement must be an absolute discharge made upon good and fair consideration.

2. It must have been executed in whole or in part, and the rights and interests of the parties changed by it.

3. There must be some equity arising upon the new agreement.

4. It must appear that a specific performance of the written agreement would be unjust under the circumstances disclosed by the parol agreement.

5. Clear and unequivocal proof must be made of the parol agreement: *Sugden on Vendors*, 138, 139; *Equity Cases*, *Abr.* 32, 44; 7 *Vesey*, 219; 2 *John. Chan.* 598.

The court will look at the peculiar circumstances of the case.

Pickle was there on the first day of May, without counsel. The objection to his money was a surprise upon him. He was

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told that he had forfeited his agreement, and was liable to damages; threatened with an arrest, unless he would give up the agreement and take a lease. Whatever he may have said under these circumstances, ought not to prejudice his rights under the articles of agreement, especially when it is not pretended that this parol agreement was ever executed by either party.

There is a pretence set up in the defendant's answer, which requires notice; it is this.

That the complainant did not tender the whole amount of the first payment in bank bills, but only about two hundred dollars.

It is evident that the defendant attempts to equivocate upon this point, in her answer.

She keeps back the fact that Sutton was there with part of the money, and ready and offered to pay it.

That she and her attorney stopped Pickle from counting the money, upon the ground that it was not specie.

The objection at the time was not to the quantity of the money, or to the kind of bills, but solely upon the ground that it was not gold and silver.

The evidence is clearly with the complainant, on this point.

In determining this case, the chancellor will consider,

1. Whether the agreement of the thirtieth of December, eighteen hundred and thirty-seven, was originally such as this court would have carried into execution? If it was, then

2. Whether what passed subsequently, ought to prevent a specific performance? *Price v. Dyer*, 17 *Vesey*, 363.

There is no objection to the original agreement. It is admitted to be a just and fair agreement.

Nothing has passed since the agreement, to vary the situation of the parties.

A performance of the agreement now, will place the parties just where they stood on the first day of May, eighteen hundred and thirty-eight, neither will have lost or gained any thing. The defendant will get the purchase money and in-

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terest, and the complainant will keep his land and improvements.

But if this agreement is not performed, injustice will be done to the complainant. He is in possession under the agreement, and has made large improvements upon the same. He has always been willing to perform the agreement on his part, and only prevented from doing so by captious objections on the part of the defendant. If this bill should be dismissed and the injunction dissolved, the defendant will turn the complainant out of possession; he will then lose the improvements and be subjected to an action for the use of the premises, without any defence at law. This would operate as a fraud upon the complainant.

As to the rights of the parties under a part performance of a contract for the sale of lands, when the purchaser has been let into possession and made improvements, see 2 *Story's Eq.* 62, 69.

When the terms of the agreement have not been strictly complied with, still if there has not been gross negligence in the party, and it is conscientious that the agreement should be performed, the court will decree a specific performance: 2 *Story's Eq.* 83—87; *Ibid*, 51, 52.

When nothing but a specific execution of the contract will do complete justice between the parties, the court will decree performance, although the party seeking it has not strictly performed his part of the contract: 1 *Peters*, 376; 2 *Story*, 84, *note*.

When there has been no change of circumstances affecting the character or the justice of the contract, when compensation for the delay can be fully given, when he who asks performance is in a condition to perform his own part of the agreement, and has shown himself ready, desirous, prompt and eager to perform the contract, the suit is treated with indulgence by the court and a specific performance will be decreed: *Story's Eq.* 87, and cases there referred to.

We submit to the court that this case is within the rules laid down in the above cases, and that the complainant has fully sustained his bill, and is entitled to relief.

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We also submit, that as the performance of the agreement has been prevented by the unreasonable conduct of the defendant, she should pay the costs.

Saxton, for defendant.

1. The complainant having failed to perform the contract on his part, is not entitled to a decree for a specific performance. He was bound to tender the first payment in specie.

2. That the agreement to rent rescinded the contract of sale: *King v. Morford*, *Saxton*, 279, 280; *Stevens v. Cooper*, 1 *John. Chan.* 429.

An agreement in writing may be discharged or rescinded by parol, notwithstanding the statute of frauds: 1 *Vern.* 240.

THE CHANCELLOR. I am of opinion,

1. The complainant is entitled to a decree for a specific performance of the contract of the thirtieth of December, eighteen hundred and thirty-seven, upon payment of the consideration therein expressed, with interest.

2. The evidence satisfies me that complainant purchased in good faith, for a fair price, and with an intention to fulfill his contract; that the defendant's conversation had fully justified the belief on complainant's part that specie would not be demanded, and was, therefore, sufficient excuse for its not being tendered on the day; and that a demand on that day, and a refusal to give reasonable time for producing the specie, was arbitrary and unjust, and will not defeat the complainant of his rights under the contract, and especially so after being in possession and making improvements on the property.

3. That the complainant's promise to take a lease was made under the impression that his right to demand a deed was gone, by the course of defendant's conduct towards him, in demanding specie, and should not be allowed to avail the defendant in equity. It was designed, under this idea only, as a protection temporarily to the complainant's possession.

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4. That complainant's decree should be without costs, after his folly on the subject of the lease.

5. That a reference be taken to a master to ascertain the amount due on the contract.

CHARLES VANCLEVE v. REUBEN GROVES and others.

A judgment at common law is not a lien upon a mere equitable interest, nor is such interest the subject of a levy and sale by virtue of an execution.

BILL for specific performance. The bill states that the complainant, having recovered a judgment in the supreme court of this state, against Reuben Groves, caused execution to be issued thereon, to the sheriff of the county of Mercer, by virtue whereof the sheriff levied, among other things, upon all the right, title and interest of the said Groves, in a house and lot of land in the city of Trenton. That the said premises having been duly advertised for sale, were sold by the said sheriff at public vendue, and struck off to the complainant, he being the highest bidder; and that the said sheriff, on the fourteenth day of November, eighteen hundred and thirty-nine, in pursuance of the said sale, executed and delivered to the complainant a deed for the said premises.

That previous to the entry of the said judgment, the said Groves had entered into a written contract with Elisha Gordon for the purchase of the said lot of land, by the terms of which Grover was to pay one hundred and fifty dollars for the said lot, with interest from the time possession was given; and that the deed was to be delivered when fifty dollars of the purchase money should be paid. That in pursuance of the agreement Groves took possession of the lot, and erected a dwelling thereon, with Gordon's assent, at a cost of several hundred dollars, and that he occupied the premises, and resided in the house at the time of the levy thereon, by virtue of the complainant's execu-

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on. That after the levy, and before the sheriff's sale, Gordon agreed with the complainant, in case he became the purchaser of Groves' interest in the said premises at the sheriff's sale, that he, Gordon, would make to the complainant a deed of the said lot, upon the payment of the purchase money agreed to be paid by Groves, with interest thereon. That relying upon the performance of the said contract by Gordon, the complainant became the purchaser at the sheriff's sale, of all the right and interest of Groves in the said lot. That subsequently to the sale, he applied to Gordon for a deed, in compliance with the agreement, which he refused to execute, alleging that he had made a deed to Charles G. Green and Joseph G. Brearley.

The bill further charges, that after the sheriff's sale, a deed was made by Gordon to Green and Brearley; that the said Green and Brearley were present at the sheriff's sale, and bid for the lot, and that they took the deed from Gordon, well knowing that the premises had been purchased by the complainant. That Gordon died after the execution of the deed, having lastly made and published his last will and testament, appointing executors, who are made defendants in the suit.

The prayer of the bill is, that the deed from Gordon to Green and Brearley may be set aside, and declared fraudulent and void against the complainant, and that the executors of Gordon may be decreed specifically to perform his agreement with the complainant; or if the deed from Gordon should be deemed valid, then that his grantee should be decreed to convey the premises to the complainant, upon the payment of one hundred and sixty-five dollars, the consideration mentioned in the said deed, with interest.

A decree *pro confesso* was taken against all the defendants except Green and Brearley. They answered the complainant's bill. The answer admits the purchase of the lot by Groves of Gordon, under the agreement set forth in the bill of complaint, the erection of a house thereon by Groves, the complainant's assignment, sheriff's sale and conveyance to the complainant, as set forth in the bill. States that Groves was indebted to the

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mercantile firms of which the defendants were respectively partners, for materials used in the erection of said house, prior to the recovery of the complainant's judgment. That under the act, entitled "An act securing to mechanics and others payment for their labor and materials in erecting any house or other building within the limits therein mentioned," the claims were filed in the clerk's office of the county of Mercer, and became respectively liens upon the said dwelling and lot of land prior to the complainant's judgments, and that judgments were subsequently recovered thereon for four hundred and ninety-one dollars and sixty-five cents. That while the said suits were pending, the defendants entered into a negotiation with Groves for the purchase of the said house and lot, and Groves thereupon agreed that Gordon should convey the lot to these defendants, upon their paying the whole of the purchase money agreed to be paid by him to Gordon, together with all liens upon the said building for work and materials. That in pursuance of the agreement, these defendants paid Gordon for the lot, and also paid and satisfied all the liens upon the said building, amounting in the whole, to seven hundred and twenty dollars, which was the full value of the said premises; and thereupon Gordon, by the written direction of Groves, conveyed the said lot in fee to these defendants, by deed dated the fourteenth of October, eighteen hundred and thirty-nine.

The answer states that the purchase was made and the title taken by them for the said premises, in good faith, for the purpose of securing their respective claims, and denies all fraud, &c.

The cause having been put at issue, and testimony taken, came on for final hearing at April term, eighteen hundred and forty three.

A question was made at the hearing, as to the validity of the liens set up by the defendants in their answer, but the cause was decided upon the validity and effect of the sheriff's deed to the complainant.

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Hulsted, for complainant, insisted, that though Groves had no legal title to the premises, the fee remaining in Gordon at the time of the levy and sale, yet that he had an equity by virtue of his contract for the purchase, and being in possession, his equity might be levied upon, and would pass by the sheriff's deed. A naked possession may be sold by the sheriff. *Den v. Winans*, 2 *Green*, 1; *Jackson v. Scott*, 18 *J. R.* 98; *Jackson v. Graham*, 3 *Cuines*, 188; *Jackson v. Parker*, 9 *Cowen*, 3; *Jackson v. Tuttle*, 9 *Cowen*, 233; *Disborough v. Outcalt*, *Saxton*, 298; *Den v. Steelman*, 5 *Huls.* 193; 4 *Am. Law Reg.*, 1225.

The defendants can take under the deed from Gordon, subject only to the complainant's equity. They admit notice; they are not *bona fide* purchasers, having paid no money. *Saxton*, 73.

H. W. Green, for the defendants, cited, *Bogart v. Perry*, 1 *John. Chan.* 52; *same case on appeal*, 17 *John.* 351; 1 *Newman's Prac.* 267; *Burdon v. Kennedy*, 3 *Atkyns*, 739; *Scott v. Scholey*, 8 *East.* 467; *Metcalf v. Scholey*, 5 *Bos. and Pul.* 61.

THE CHANCELLOR. At the time of the complainant's judgment at law, and of the sheriff's levy and sale, by virtue of the execution issued thereon, Groves, the defendant, had an equitable interest in the premises, by virtue of his contract with Gordon. He had no legal title. A mere equitable interest, though accompanied with possession, is not the subject of a levy and sale, by virtue of an execution at common law. The complainant acquired no lien upon Groves' equitable interest, by virtue of his judgments, and no title to the premises by virtue of the sheriff's deed. The bill must, therefore, be dismissed, with costs.

Decree accordingly.

WILLIAM CHETWOOD V. STEPHEN P. BRITTAN.

It is not competent to show by parol, that at the time of executing a bond, the obligee agreed that the obligor should not be personally liable, but that the obligee would look to the mortgage security for payment.

BILL for a perpetual injunction, to restrain the defendant from proceeding at law to recover the balance due upon a bond given by the complainant to the defendant. The bond was secured by a mortgage of even date upon real estate. The mortgage had been foreclosed, and the mortgage security proving inadequate, the defendant commenced a suit at law against the complainant to recover the balance due upon his bond. The ground of relief disclosed in the bill is, that at the time of executing the bond, it was agreed that the obligor should not be personally responsible for the debt, the obligee declaring that the obligor need be under no apprehension of trouble or difficulty as to liability, as he (the obligee) would take the land, or look to the land, at any time for the balance of the consideration money; upon which assurance the complainant was induced to sign the bond and mortgage.

The answer denies the agreement charged in the bill, and also denies that the bond and mortgage were delivered on any terms or conditions inconsistent with the absolute delivery thereof.

Upon filing the bill an injunction issued. The defendant having filed his answer, applied to dissolve the injunction, at July term, eighteen hundred and forty-one. The motion was denied, and the injunction continued to the final hearing.*

The cause came on for final hearing at a special term, at Newark, on the twenty-third day of May, eighteen hundred and forty-three, upon bill, answer, replication and proofs.

W. Chetwood and O. S. Halsted, for complainant.

A. Whithead and I. H. Williamson, for defendant.

* See ante, vol. i. page 438.

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Cases cited on the part of the complainant. 3 *Starkie's Ev.* 1014; 1 *Ibid*, 306, 7, note; 1 *Esp.* 357; 1 *Peake*, 64; *Phil. Ev.* 356, 7; 1 *John. Cas.* 153; 4 *Cranch*, 219, 222; 2 *Salk.* 444; 3 *Atkyns*, 388; 1 *Wilson*, 313; 1 *Dallas*, 424; 2 *Dallas*, 171; 4 *Dallas*, 340; 6 *Mass.* 492; 6 *John.* 110; *Coxe*, 86, 178; 4 *Hals.* 144; *Saxton*, 356; 1 *Mad. Prac.* 205, 213; 1 *Com. on Con.* 36, 37; 1 *Bro. Chan. C.* 54; 2 *Vesey, sen.* 380; 1 *Vern.* 296; 3 *John.* 528, 530; 2 *John. Chan.* 416.

Cases cited on the part of the defendant. 2 *Wilson*, 275; *Cas. in Chan.* 20, 29; 1 *Vesey*, 241; 5 *Eng. Com. Law*, 268; 1 *Bro. Chan. C.* 92; 2 *Ibid*, 219; 4 *Ibid*, 514; 4 *Taun.* 783; 7 *Vesey*, 211; *Grisley's Eq. Ev.* 206; 1 *John. Chan.* 279, 425; 1 *Peters*, 598; 3 *Harr.* 506; *Swift's Ev.* 153, 149; 6 *Wendell*, 277; 2 *John. Chan.* 557; *Greenl. Ev.* 315; 11 *Mass.* 30; 2 *W. Blac.* 1249; 3 *Barn. and Ald.* 233; 1 *Mass.* 244; 8 *Mass.* 146.

THE CHANCELLOR. This case has been partially considered on a former occasion. It was on the motion to dissolve the injunction. On that motion the injunction was continued until the hearing, that an opportunity might be afforded better to get at the true merits of the controversy. The parties have now brought the cause to a final hearing on the merits, and it must be disposed of.

The facts are few. Mr. Middlebrook agreed with the defendant, in the year eighteen hundred and thirty-six, to purchase of him a piece of land in the township of Elizabeth, in the county of Essex, containing about twenty-seven acres, at two hundred and seventy-five dollars an acre. In the purchase of this land, or twenty-four acres of it, the complainant became interested with Middlebrook. Before, however, the deed was given, Middlebrook, with the consent of complainant, sold out the twenty-four acres to a company got up by captain Williamson, at a considerable advance. This company prevailed on the complainant to take the deed for the land, to hold in

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trust for the several shareholders. The deed was accordingly made to him, and he gave his bond and mortgage to the defendant, for the sum which it had been agreed should be secured on the land itself. At this time, the idea that the land would ever fail to pay off the incumbrance, never entered into the head of any body. It was when the land mania prevailed in its wildest form. Things have resulted otherwise, the land has been sold under the mortgage, and has left a very considerable sum unpaid on the bond. The defendant prosecuted the complainant at law on this bond for such deficiency, and an injunction was ordered, restraining further proceedings in that action. That injunction is now asked to be made perpetual.

The allegation of the complainant, and on which the whole case turns, is, that at the time the bond and mortgage were executed, before signing the bond, the complainant expressed his unwillingness to become bound for the debt of others, where the defendant said, he need be under no apprehension on that score, "as he would take the land, or look to the land at any time for the balance due on the bond." It is upon this ground, this declaration made by the defendant at the time the papers were executed, that the complainant insists upon his right to be discharged from the payment of his obligation.

The competency of this evidence has always embarrassed the complainant's cause. Is it any thing short of allowing a witness, when a party signs and seals a bond promising to pay so much money, to contradict the paper, by testifying that it was agreed at that very time that the money was never to be paid, but that the obligee should take the land contained in the mortgage in payment? The writing says, the obligor is to pay in money; the witness says, he was not to pay at all, but the land contained in the mortgage was alone to be looked to. What security can the public have in writings and seals, if they may thus be set aside by the breath of witnesses?

It will be observed, this is not a case of fraud, or mistake, or circumvention. The bond was given as agreed, and there is nothing about the transaction different from what was designed.

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The defendant says he was to be paid in money, and shows as **evidence** the bond of the complainant, fairly given. The **complainant** then strives to defeat the recovery, by showing by **parol** that he was not to pay it, and that by a verbal agreement **made**, not at a subsequent day, but at that very time, the **obligee** agreed to look to the land alone. If this is not **contradicting** a written agreement, and under seal too, by parol, then I do **not** know any case in which it can be done.

Too much latitude has already been given, I fear, for the **good** of society, in allowing parol proof in explanation of **written** agreements; but no case, as it appears to me, has yet gone as far as I am asked to go in this. The authorities on the **subject** have been reviewed heretofore, and need not be again **examined**. In cases of trust, I am aware, parol evidence has **been** admitted to show who are the persons beneficially **interested**. It is a rule adopted to meet the necessity of that case. So a **deed** absolute on its face, may be shown to have been **delivered** as an *escrow*. This, however, does not affect the writing, but its delivery only. Nor will it do to be guided by those **decisions** where courts of equity, on a bill for a specific **performance**, have indulged defendants in parol proof in excuse for not fulfilling written contracts. Here a latitude has been given which belongs to no other case. The same proof will not be **allowed** the complainants in those very actions.

I must, therefore, be understood as entertaining a strong **conviction** against the competency of the evidence offered by the complainant, and adhering to the views heretofore expressed in my **opinion** on this subject; but I am disposed, under the peculiar circumstances of this case, and especially so as I may be **mistaken** upon the question of evidence, to look into the merits of the **controversy**.

The bill charges (and it being an injunction bill, is under **oath**) that the defendant told the complainant at the time, and before signing the bond, that he need be under no apprehensions of trouble or difficulty as to liability, "as he would take the land **or** look to the land at any time, for the balance of the consider-

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ation money." The answer meets this charge "by denying unequivocally, and without any qualification, that the said bond and mortgage were delivered on any terms or conditions inconsistent with the absolute delivery thereof." It is further admitted, however, in the answer, that after the papers were executed, and at the time they were exchanged, the complainant said in a pleasant way, that he hoped the defendant would look to the land first, before calling on him for the bond, which the defendant agreed to do. Thus the statements in the bill and the answer are entirely different. The evidence mainly relied on, is that of Mr. F. B. C., the only person present at the time of executing the papers, and the witness on the bond. He alone can prove what took place at the time. He is a gentleman in whom great reliance may be placed, and he has evidently, in this case, felt the peculiarity of his position, and spoken with commendable caution. He does not profess to give the words used, but the ideas only. This is the statement he makes: "My father made objections to giving his bond to make himself responsible for the debt of others, for he had no interest at all in the matter; Mr. Brittan replied, in substance, that he need not be afraid to execute the bond on that account, he would take the land at any time for the balance of the debt; my father executed the bond then and the papers were exchanged." This is the length and breadth of the whole case, and no doubt honestly and fairly related. Was it anything more than a passing remark of the defendant, made to show (and truly at the time) his confidence in the value of the land? Did he really intend by that observation to absolve the complainant from all liability to him on his bond? If so, why execute the bond at all? It was not necessary to create a lien on the land; that might as well have been done by a mortgage alone, without the bond. Beside, it is out of the ordinary course of business, to sell land and have no person as bondman or paymaster, and if it was designed to absolve the complainant from any obligation whatever, it is reasonable to suppose that the defendant would have insisted on a bond from the persons beneficially in-

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terested in the purchase. To conclude that the parties intended to discharge the complainant from all personal responsibility, and yet take his bond, and that too without reducing such stipulation to writing, or preserving any further proof of it than the observation thus incidentally made by the defendant, is against all the notions I entertain of the course of business between man and man. If intended as anything more than a passing remark, or designed to discharge the complainant from all liability on the instrument he was executing, it is reasonable to suppose some endorsement to that effect would have been made on the bond at the time. It is not sufficient that the expression was calculated to encourage the complainant to place his signature to the bond; it is necessary to go further, and to be satisfied that it was intended by the parties, and so understood by the defendant in particular, at the time, as a settled agreement, that in no event should the complainant be called on to pay his bond, but the land alone should be resorted to.

My idea is, that the conversation between these parties was a casual one, expressive of the confidence the defendant had in the value of the land, without designing to alter or vary the legal obligations the parties were then entering into. This proof, it will be seen, varies somewhat from the charge in the bill. The charge is, that the defendant said he would take the land or look to the land for the debt. The evidence is, that he said he would take the land for the debt; the difference is, perhaps, not material, but the proof is not as strong as the charge in the bill. It appears from Mr. Chetwood's evidence, further, that the defendant said there was no danger of the land coming back to him; that it was worth a great deal more than the incumbrance of the mortgage, after so much had been paid on it. This is the most direct part of the evidence, but it is not all. Isaac Coles testifies that the defendant, when asked why he foreclosed on the complainant, who was a responsible man, answered, as he understood him, that he was not personally responsible, but was only a stake-holder; that several others were engaged in it; it was a speculation concern, and he looked to

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others for payment. This evidence amounts to nothing more, when fairly considered, than the facts of the case fully warrant, that the complainant was acting for others, and the debt belonged to them to pay. The evidence of all the witnesses, of Mr. Bryant, Mr. Middlebrook, Mr. Crane and others, show that the complainant was known not to be interested in this transaction, personally, and great pains seem to have been taken by the defendant, to protect him from loss by securing his money from those who were really, in honor and justice, bound to pay it.

The fact that while the present bond and mortgage was outstanding, the defendant borrowed one thousand dollars of complainant and gave him his note for it, furnishes no proof that the defendant did not mean to collect this bond. The parties were friends, in habits of intimacy, and no doubt the defendant never designed to call on complainant but in the last extremity. The whole case shows this; men often enter upon fresh contracts, without intending to blend them with those then pending between them; and it appears that at the very time of loaning the one thousand dollars to the defendant, he held the joint note of complainant and his son, for five or six hundred dollars, which it is not pretended was affected by the new loan, nor designed so to be.

There is a view of this case which must not be passed by. If it was a fixed agreement that the defendant was at any time to take the land for his pay, it was surely requisite that the complainant should retain the land for that purpose. But this he did not do, nor could he, within the contemplated arrangement of the parties. The land had been sold out into shares, (according to the fashion of the day,) and every one of the share-holders became interested in and were part owners of the land. Accordingly, we find the complainant, a few days after the date of his deed from the defendant, executed to two of the share-holders a scrip for their shares, under his hand and seal, reciting the interest they severally had in the land, the amount paid and secured to be paid by them, and declaring

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that he held the property in trust for them and others interested, and to be disposed of as they should direct. This writing, as it appears to me, is incompatible with the idea of returning the land to the defendant for the face of the bond. The complainant's power over it, after the issuing such a scrip, was gone. The two scrips above stated, are the only ones exhibited, but like scrips were given to the other share-holders. Nor can the evidence of Mr. Middlebrook be reconciled with the idea that the complainant was not to be called on for payment of the bond. He says, that when he and captain Williamson first called on the complainant to take the deed for the property, he objected to it, and was not willing to give his bond and mortgage; but they told him there was no danger, that the property was safe for the money, when he agreed to take the title and to give his bond and mortgage. This witness further says, that he was absent for some time and returned before the mortgage was foreclosed, and had a number of conversations with the complainant, who expressed his fears that he had got in difficulty by taking the title for the property, and that in case of loss, the witness, who was interested in the original purchase, ought to bear his proportion. The complainant, he says, never, in any of these conversations, set up that he was not personally responsible on the bond to the defendant, but always insisted that the share-holders ought, in justice, to come forward and pay it. The witness went so far as to offer his services to complainant, to get a paper signed by the share-holders, stipulating, upon receiving a deed for their shares, to comply with their purchase, and thus relieve him, and he actually got one signed by four of them, which paper is marked an exhibit in the cause. This paper was shown to the complainant, who declared he could not portion off the shares in that way, and said there ought to have been a bond of indemnity. All this is incompatible with anything short of the complainant's liability; that the complainant was a trustee, and only a trustee for others in this land, is certainly true, but he consented to take a title, and to give his own bond and mortgage to the defendant, and as be-

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tween him and the defendant therefore, it became a personal obligation. The arrangement by which the title passed to the complainant, was made between the complainant and those who purchased the land ; the defendant had no part in it, except when it was suggested to him, he agreed to it. The shareholders should unquestionably pay this money ultimately, but the defendant, by accepting the bond of the complainant, has effectually shut himself out from any resort to them. The remedy on his part is only against the complainant, and he must resort to those in whose behalf he has interposed his responsibility.

The case is a hard one upon the complainant, and I would cheerfully have availed myself of any equitable principle for his relief, but I have not been able to satisfy myself that he has made out such a case as will justify the further interference of this court. He stands in the position of surety for others, a position which he imprudently and yet voluntarily assumed.

I cannot but view this case, and the developments made in it, as furnishing ample evidence of the wisdom of that rule of law, which forbids any proof from witnesses contradicting the writing itself, if spoken at the time of its execution ; and most certainly, if such proof is admitted, it should leave no doubt ~~when~~ produced, that the conversation was designed by all the parties, to make the contract in its legal operation, different from ~~that~~ stated in the writing.

The bill must therefore be dismissed, with costs.*

* This decree was unanimously affirmed in the court of errors and appeals, at April term, eighteen hundred and forty-six.

ANN P. WHITE and others v. The EXECUTORS of SAMUEL
S. OLDEN and others.

testator, after numerous general and specific legacies, gives as follows:—
"After all my just debts are paid, and the expense of fulfilling this my last
will and testament, I give and bequeath all the remainder of my property,
both real and personal, of whatsoever kind and description, to be equally
divided among my four cousins, J., R., G. and J. W." *Held*, that the tes-
tator designed to charge the lands devised in the residuary clause with the
payment of the debts and legacies, not as a primary fund, but in aid of the
personal estate.

THE bill in this cause was filed on the twenty-fourth of Jan-
ary, eighteen hundred and forty-two, by Ann P. White, George
Amelen Hare, Rebecca N. Paxson, William R. Skillman and
letty his wife, Garret Hulfish and Abby his wife, Mahala Voor-
tees, The Rector, Wardens and Vestrymen of Trinity Church,
in the borough of Princeton, Eliza Jerome and Hansen Vanest,
all of the county of Mercer, in the state of New-Jersey; John
Willits and Mary P. Willits his wife, and Elizabeth Bates,
of the city of Philadelphia, in the state of Pennsylvania; Ra-
phael Elton and Catharine Olden, of Doylestown, in the county
of Bucks, and state of Pennsylvania; Benjamin Swain, of the
county of Bristol, county of Bucks, and state of Pennsylvania;
letty Hollingshead, of Wheeling, in the state of Virginia; and
D. Wolf, of the city and state of New-York, treasurer of the
Domestic and Foreign Missionary Society of the Protestant
episcopal Church in the United States of America—legatees
under the will of Samuel S. Olden, deceased, against the ex-
ecutors and the residuary devisees named in the said will.

The bill charges, that Samuel S. Olden, late of the township
Princeton, county of Mercer, and state of New-Jersey, de-
ceased, being in his lifetime seized and possessed of a large
real and personal estate, and being of sound and disposing
mind and memory, did, on or about the eighth day of Februa-
ry in the year of our Lord eighteen hundred and forty-one,
make and publish his last will and testament in writing, which

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was executed and attested in such manner as by law is required for passing real estate, and was in words and figures, or to the purport and effect following :

"I, Samuel S. Olden, of the township of Princeton, county of Mercer, and state of New-Jersey, considering the uncertainty of this mortal life, and being of sound mind and memory, do make and publish this my last will and testament in manner and form following, to wit: Item, I give and bequeath to my dear aunt, Ann P. White, who since she has had the charge of us, has acted the part of a kind and devoted mother, the sum of ten thousand dollars, to be paid to her as soon as practicable after my decease, or with interest from that time. Item, I give and bequeath to my executors herein after named, the sum of eight thousand dollars, in trust to be paid over and transferred by them in money or in good bonds and mortgages, as my estate may be invested in at the time of my decease, to the convention of the Protestant Episcopal Church of the Diocese of the state of New Jersey, or to proper persons to be appointed by said convention competent in law to receive and hold said bequest, nevertheless specially in trust for ever, to hold the said securities, or to invest, and from time to time to re-invest as may become necessary, the said bequest in good and safe security to produce a yearly income (the capital or principal sum always being kept whole) for the maintenance and support of a missionary to be employed in the state of New-Jersey under the direction and sanction of said convention—the above bequest is left with the expectation that it will be applied to the support of a travelling rather to a stationed missionary, still, the convention are at liberty to use it for the latter, if at any time they may think the cause of Christ will most prosper thereby. Item, I give and bequeath to James Swords, or his successor, as treasurer, in trust, the sum of six thousand dollars, to be paid over to him in good bonds or mortgages, for the use and purpose of the Domestic Missionary Society of the Protestant Episcopal Church of the United States of America, nevertheless, in trust to hold the said securities, or to invest, and from time to time to

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re-invest, as may become necessary, the said bequest in good and safe security (the capital or principal sum being always kept whole) to produce a yearly income to be applied to domestic missions in the states now under the Episcopal supervision of bishops Kemper and Polk. Item, I give and bequeath to my cousin, Elizabeth Bates, the sum of fifteen hundred dollars. I give and bequeath to my cousin, Robert White, the sum of one thousand dollars. Item, I give and bequeath to my cousin, John White, the sum of five hundred dollars. Item, I give and bequeath to my loved friend and pastor, G. E. Hare, the sum of fifteen hundred dollars. Item, I give and bequeath to my cousin, Rachel Elton, the sum of thirteen hundred, with the understanding that she is to pay to her sister Catharine, yearly, the legal interest of three hundred dollars during the lifetime of the said Catharine. I give and bequeath to Catharine Olden, the sum of two hundred dollars. Item, I give and bequeath to my friend, Rebecca A. Paxson, the sum of five hundred dollars. Item, I give and bequeath to Stacy A. Paxson, senior, the sum of five hundred dollars, in trust, for the use and benefit of his son, Stacy A. Item, I give and bequeath to Eliza, widow of the late Rev. A. B. Jerome, the sum of five hundred dollars. Item, I give and bequeath to Hetty Hollingshead, my faithful nurse, the sum of one hundred dollars, and to her daughter Hetty I bequeath the same sum. Item, I give and bequeath to Abby, wife of Garret Hulfish, the sum of one hundred dollars. Item, I give and bequeath to Mahala Voorhees, widow of the late James Voorhees, the sum of one hundred dollars. Item, I give and bequeath to Benjamin Swain, of Bristol, Pa. (at whose house my dear brother John was so carefully nursed, when he so narrowly escaped drowning in the river Delaware) the sum of one hundred, as a remembrance of his kindness. Item, I give and bequeath to the corporation of Trinity Church, Princeton, the sum of five hundred dollars, in trust, for the use and purpose of assisting to build a parsonage for said church, on condition only that the said parsonage be commenced within one year after my decease; if such should

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not be the case, then I leave the last mentioned sum thus: two hundred dollars to the General Missionary Society of the Protestant Episcopal Church, for the purchase and distribution of Sunday school books, prayer books, &c., and three hundred dollars to the Theological Seminary of the Protestant Episcopal Church of the city of New-York. Item, I give and bequeath to the corporation of Trinity Church, Princeton, the sum of four hundred dollars in trust, for the use and support of her parish school, the interest only to be applied, unless the principal is specially needed. Item, I give and bequeath to the corporation of Trinity Church, Princeton, the sum of one hundred dollars in trust, for the use and support of her Sunday school, the interest to be applied yearly for the purchase of books, &c. Item, I give and bequeath to my dear aunt, Ann P. White, all the household and kitchen furniture and books I may possess at the time of my decease, except that may be hereafter named. I give to her also my two-seated dearborne carriage and harness and whatever horse she may choose. My bank stock I wish to make a part of my dear aunt's legacy, as they will give her less trouble in collecting. Item, I give and bequeath my one-seat carriage, harness, with my horse Malcolm, to my beloved pastor, the Rev. George E. Hare. Item, I give and bequeath to my cousin, Mary W. Spackman, the secretary and bookcase left me by my uncle Samuel, with the books contained in it that belong to me. Item, I give and bequeath to my cousin, P. A. Olden, the telescope and Edinburgh Encyclopedia left me by the same uncle. Item, After all my just debts are paid and the expense of fulfilling this my last will and testament, I give and bequeath all the remainder of my property, both real and personal, of whatsoever kind and description, to be equally divided among my four cousins, Job, Robert, George and John White. Item, I wish that the house that I have lately purchased of C. M. Campbell, valued at four thousand dollars, to be part of my dear aunt's legacy, and that in the division of her portion my Trenton Bank be calculated at forty dollars per share and the Easton Bank at thirty dollars per share. Lastly,

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I do hereby nominate, constitute and appoint my cousin, William White, and friends, Charles S. Olden and Stacy A. Paxson, executors of this my last will and testament, hereby revoking all other and former wills by me had, made or executed, and declaring this present writing to be my last will and testament; in witness of which I have hereunto set my hand and seal, this eighth day of February, in the year of our Lord eighteen hundred and forty-one."

That the said testator afterwards, and on or about the twenty-eighth day of May, in the year of our Lord eighteen hundred and forty-one, made and published a codicil in writing to his said will, and which was also executed and attested as by law is required for passing real estates, which said codicil was in the words and figures or to the purport and effect following :

"I, Samuel S. Olden, do make this present codicil, which I order and direct shall be taken as and for part of my last will and testament, bearing date the eighth day of February, eighteen hundred and forty-one. I give, devise and bequeath to my aunt, Ann P. White, her heirs and assigns for ever, all that lot of woodland, situate and laying in the township of West Windsor, and bounded on the north and east sides by the lands late of James Olden, deceased, on the west by lands belonging to Joseph Clarke, and on the south by a meadow late the property of James Olden, deceased, containing fifteen acres, more or less, and also all the meat and other provisions, and the vessels containing the same, that may be in the house where I now reside; also two pigs in the pen, also one cow of her choice, also all the plate in my house, be the same more or less. I give and bequeath to my friend Mary P. Willits, wife of John F. Willits, two hundred dollars, as a token of my regard, to be paid in six months after my decease. I order and direct my executors to pay, in six months after my decease, the sum of fifty dollars to Hansen Vanest, to be held by him for the benefit of his present youngest son, Olden Vanest. I give and bequeath to Charles S. Olden the sum of seventy-five dollars, to be paid in six months after my decease, and to be applied by

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him towards the erection of a church or school-house in the neighborhood of Wrightstown, Pennsylvania. In testimony whereof, I, Samuel S. Olden, have hereunto subscribed my name and affixed my seal, this twenty-eighth day of May, eighteen hundred and forty-one:" as by the said last will and testament and codicil thereto, now in the possession of the complainants, and to which they pray leave to refer, will more fully appear.

That the said Samuel S. Olden departed this life on or about the fifth day of June, in the year of our Lord eighteen hundred and forty-one, without having altered or revoked the said will, other than by the said codicil, and without having altered or revoked the said codicil. That the said William White, Charles S. Olden, and Stacy A. Paxson, the executors in the said will named, soon after the death of the said testator, and on or about the twenty-second day of June, in the year of our Lord eighteen hundred and forty-one, duly proved the said will and codicil before William P. Sherman, esquire, the surrogate of the said county of Mercer, and took upon themselves the burden and execution thereof.

That since the death of the said testator, Hetty Hollingshead, the younger, one of the legatees named in the said will, has intermarried with and is now the wife of the complainant, William R. Skillman, and by virtue of such intermarriage, the said William R. Skillman, in right of his said wife, became entitled to demand and receive the aforesaid bequest of one hundred dollars. And that the complainant, I. D. Wolf, is the successor of James Swords, another of the legatees named in the said will, as treasurer of the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, and as such successor is entitled to demand and receive the aforesaid bequest of six thousand dollars, in trust, for the uses and purposes in the said will expressed.

That shortly after the death of the said Samuel S. Olden, the said William White, Charles S. Olden, and Stacy A. Paxson, in virtue of their said character as executors, took posses-

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sion of all the personal estate and effects of the said Samuel S. Olden, deceased, amounting to the sum of thirty thousand dollars, or some other large sum of money.

That in addition to the house and lot mentioned in said will, and directed to be made a part of the complainant, Ann P. White's, legacy, and the lot of woodland of fifteen acres mentioned in the said codicil, the said Samuel S. Olden, at the time of his making and executing his said will, and at the time of his death, was seized of, or entitled to, a very considerable real estate, consisting of two large and valuable farms, situated in the neighborhood of Princeton, and in the said county of Mercer, and that the said Job White, Robert White, George White and John White, to whom the remainder of the testator's property was given, after the payment of all his just debts and the expenses of fulfilling his said last will and testament, upon, and soon after the death of the said Samuel S. Olden, entered upon and took possession of all the said real estate and premises, and that they have received and still do receive all the rents and profits thereof.

That the said William White, Charles S. Olden, and Stacy L. Paxson, executors as aforesaid, having possessed themselves of the said testator's personal estate and effects as aforesaid, the complainants have made repeated applications to them and requested them to pay and satisfy the said several and respective legacies of the complainants, by and out of the said testator's personal estate and effects, if the same were sufficient for that purpose; and the complainants have also applied to the said Job White, Robert White, George White and John White, and requested them, that if the said testator's personal estate and effects were not sufficient for the payment of the said legacies, they would consent that the deficiencies thereof might be raised by a sale of a competent part of the said testator's real estate, the said legacies being as the complainants are advised, and so expressly charge, a charge upon the real as well as the personal estate of the said testator,) or that if the testator's personal estate and effects were not sufficient for the payment of

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the said legacies by reason of the application thereof, or any part thereof, to the payment of the debts of the said testator, and the expenses incident to the settlement of his estate, that, in that case, the testator's real and personal estate might be marshalled and his personal estate and effects applied in payment of the said legacies, and the said debts and expenses paid out of his real estate, and which the complainants are advised and expressly charge ought to be done, &c.

The bill further states, that the complainants are advised and humbly insist, that if, after payment of the said debts and expenses, the personal estate and effects of the said testator are not sufficient for the payment of the said legacies, that the complainants are entitled to have their respective legacies paid out of the real estate whereof the testator died seized as aforesaid; or that if the personal estate and effects of the said testator have been exhausted by the said executors in the payment of the said debts and expenses, that the complainants ought, and are entitled in a court of equity, to have the said testator's assets marshalled, and to have satisfaction for their respective legacies out of the said testator's real estate, to such amount, and for so much as shall have been applied to the payment of the said debts and expenses, out of the said testator's personal estate, and that such real estate or a competent part thereof ought to be sold for that purpose, and the said testator's personal assets ought to be applied solely to the payment and discharge of the said legacies so as aforesaid due to the complainants and to the said defendants.

The prayer of the bill is, that an account may be decreed to be taken out of the moneys due to the complainants, and such of the said defendants as are legatees under the will of the said testator, in respect of the said several legacies, and of the debts owing by the said testator at the time of his death, and of his funeral expenses, and the expenses attending the settlement of his said estate; and that an account may also be taken of the said testator's personal estate and effects possessed or received by the said defendants, William White, Charles S. Olden and

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Henry A. Paxson, executors as aforesaid, or by any other person or persons by their order or for their use; and also an account of the rents and profits of the said testator's real estate assessed or received by, or by the order or for the use of the said defendants, Job White, Robert White, George White and John White; and that the complainants may be paid the full amount of their said several and respective legacies out of the said testator's personal estate, if the same shall be sufficient for that purpose, after payment of the debts of said testator and the expenses attending the settlement of said estate; but if the same shall be insufficient for that purpose, then that the real estate of the said testator, or a competent part thereof, may be sold, and the proper parties directed to join in such sale, and that the money to arise from such sale and the rents and profits of the said real estate so received by the said defendants, Job White, Robert White, George White and John White, may be applied in aid of the personal estate, in payment of so much of the said legacies as such estate shall be found insufficient to pay; or that the debts of the said testator and the expenses attending the settlement of his said estate, may be paid out of his real assets, and the legacies paid out of his personal assets; and that proper directions may be given in that behalf; and if any of the said testator's personal estate shall appear to have been applied to the payment of the said debts and expenses, that then the complainants may be declared to be entitled to a satisfaction for their said legacies out of his real estate, to such amount as shall have been applied to the payment of the said debts and expenses out of the testator's personal estate, and that sufficient parts of the said real estate may be sold for raising the same, and that all proper parties may be decreed to join in such sale; and that by and out of the moneys to arise therefrom, the complainants may be respectively paid and satisfied their said several legacies and their costs of this suit; and that all the title-deeds and writings relating to the said estate, may be produced, and proper and necessary directions given to obtain the several purposes aforesaid, and the payment of the complainants' said

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legacies : and that the complainants may have such further and other relief in the premises as shall be agreeable to equity and good conscience.

On the thirtieth of June, eighteen hundred and forty-two, the defendants, Job White, Robert White, George White and John White, the residuary devisees in the said will, filed a demurrer, and thereby demurred to so much and such parts of the respondents' bill of complaint as charge that the legacies therein mentioned, bequeathed in and by the last will and testament of the said Samuel S. Olden, deceased, are chargeable upon the real estate of the said testator, if the personal estate of the said testator should prove insufficient for the payment of the said legacies : and also to so much and such parts of the said bill as charge that in case the legacies are not a charge upon the real estate, then that the debts of the said testator are by the provisions of the said will to be paid out of his real estate.

On the first of February, eighteen hundred and forty-three, the respondents filed a bill of revivor and supplement, whereby Thomas N. Stanford, of the city and county of New-York, treasurer of the Domestic and Foreign Missionary Societies of the Protestant Episcopal Church in the United States of America, was made one of the complainants, (in the stead of the former treasurer of said society,) and Benjamin C. White, Elizabeth T. White and Martha Ann White, the only children and heirs at law of Job White, deceased, being infants, were made defendants, the said Job White having departed this life after the filing of the original bill.

Hearing upon demurrer, at April term, eighteen hundred and forty-three.

H. W. Green and *Vroom*, for the defendants, in support of the demurrer.

Field and *Dayton*, contra.

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Cases cited by defendants' counsel.

1. As to the construction of the will. The legacies are not charged on the land: *Walker v. Jackson*, 2 *Atkyns*, 624; *Haslewood v. Pope*, 3 *P. W.* 322; *Livingston v. Livingston*, 3 *John. Chan.* 158; *Harris v. Fly*, 7 *Paige*, 425; *Davis v. Gardner*, 2 *P. W.* 187; *Kightley v. Kightley*, 2 *Vesey*, 330; *Keeling v. Brown*, 5 *Vesey*, 359; *Parker v. Fearnley*, 2 *Sim. and Stu.* 592; *Lupton v. Lupton*, 2 *John. Chan.* 614; *Gridley v. Andrews*, 8 *Conn. Rep.* 1; 1 *Roper on Leg.* 454; *Driver v. Ferrand*, 1 *Russ. and M.* 681; *Hoye v. Brewer*, 3 *Gill. and J.* 153; *Wyse v. Smith*, 4 *Ibid*, 295; *Swift v. Edson*, 5 *Conn. R.* 531.

2. That the assets should not be marshalled: *Forrester v. Leigh, Ambler*, 172; *Hamly v. Fisher, Dickens*, 104; 1 *P. W.* 680; *Powell on Dev.* 655.

Cases cited by complainants' counsel.

1. As to the construction of the will: 1 *Roper on Leg.* 448; *Tomkins v. Tomkins*, *Pre. Chan.* 397; *Trott v. Vernon*, *Ibid*, 430; 2 *Vern.* 708; *Aubrey v. Middleton*, 4 *Vin. Ab.* 460, *Pl.* 15; 2 *Eq. Cas. Ab.* 497; *Bench v. Biles*, 4 *Mad.* 187; *Alcock v. Sparhawk*, 2 *Vern.* 228; *Minor v. Wicksteed*, 3 *Bro. Chan.* 627; *Hassel v. Hassel*, 2 *Dickens*, 527; *Austin v. Halsey*, 6 *Vesey*, 475; *Webb v. Webb, Barnard*, 86; *Lypet v. Carter*, 1 *Vesey, sen.* 499; *Edgell v. Haywood*, 3 *Atkyns*, 352; *Nichols v. Postlethwaite*, 2 *Dallas* 131; *Tucker v. Hassenclever*, 3 *Yeates*, 294; *S. C.* 2 *Binney*, 525; *Witman v. Norton*, 6 *Binney*, 395; 2 *Am. Eq. Dig.* 181; *Downman v. Rust*, 6 *Rand*, 587; *Ronalds v. Feltham*, 1 *Turn. and R.* 418; *Jeremy's Eq.* 102; 2 *Fonb. Eq.* 463; 2 *Hilliard's Ab.* 539; 2 *Kent's Com.* 282, 3; *Ram. on Assets*, 58; *Cole v. Turner*, 4 *Russ.* 376; *Brudenell v. Boughton*, 2 *Atkyns*, 268.

2. As to marshalling the assets: 8 *Vesey*, 376; *Jeremy's Eq.* 539; *Ambler*, 128; 1 *Dickens*, 105; 2 *Fonb.* 515; 3 *Bro. Chan. C.* 347; 1 *P. W.* 403; 3 *Vesey*, 379.

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THE CHANCELLOR. Samuel S. Olden, a highly respectable gentleman, residing near Princeton, died in June, eighteen hundred and forty-one, seized and possessed of a large real and personal estate; he left a will which bears date on the eighth of February, eighteen hundred and forty-one, and a codicil bearing date the twenty-eighth of May, eighteen hundred and forty-one, both of which are executed agreeable to the laws of this state. The will and codicil were both made but a short time before his death. A question has arisen upon the construction of the will, and the parties have instituted this suit for the purpose of obtaining a judicial determination upon it. It is evidently the desire of all, not to litigate, but to obtain a decision of this court, upon the merits of the cause, in the easiest and most direct course practicable.

The bill sets out the making of the will by the testator, and its probate in due form of law. The will itself is also set forth in words at length; by it there are several specific legacies given, amounting in the whole to thirty-three thousand dollars. These legacies vary in amount from one hundred dollars to ten thousand dollars. The first clause is a bequest of ten thousand dollars to Ann P. White, whom the testator affectionately terms his dear aunt, and of whom he adds, "since she has had the charge of us, has acted the part of a kind and devoted mother." The next item, is a bequest of eight thousand dollars to his executors in trust, to be paid over to the convention of the Protestant Episcopal Church of the diocese of New-Jersey, for the support of a missionary in said state. The third item, is a bequest of six thousand dollars to the treasurer of the Domestic Missionary Society of the Protestant Episcopal Church of the United States, to be applied to the cause of domestic missions in the states therein designated. Another item, is a bequest of fifteen hundred dollars to the rector of the church at Princeton, whom he denominates as his "loved friend and pastor, G. E. Hare." Another item, is a bequest of one hundred dollars to Hetty Hollingshead, whom he denominates "his faithful nurse," and another of one hundred dollars to Benjamin Swain, of

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lately, Pennsylvania, who is referred to as the person "at whose house his dear brother John was so carefully nursed, and he so narrowly escaped drowning in the Delaware." Another item, is a bequest of five hundred dollars to the corporation of Trinity Church, at Princeton, towards the erection of a steeple; of four hundred dollars for the support of a parish school, and one hundred dollars for the purchase of books for a Sunday school. The remainder consists of legacies in different amounts to his relatives and friends, most of whom he designates as his cousins. Of the thirty-three thousand dollars, therefore appears, that fifteen thousand dollars is given to religious objects and charities, and the balance in personal legacies to his friends and relatives. After thus far disposing of his property, and giving in addition a few specific articles to his friends, he makes the following clause, upon which the difficulty in construing the will has arisen.

The clause is in these words: "Item, After all my just debts are paid, and the expense of fulfilling this my last will and testament, I give and bequeath all the remainder of my property, both real and personal, of whatsoever kind and description, to be equally divided among my four cousins, Job, Robert, George and John White."

The object of this suit is to obtain an account of the estate, and payment of the legacies, from the personal estate if sufficient, and if not then from the land, and if not, then that the debts and expenses of settling the estate should be paid out of the real estate.

There is a demurrer to the bill, upon which two questions are raised. First, are the legacies in this will chargeable on the real estate? and, secondly, if not, are the debts chargeable on the real estate, and will a court of equity direct, under the provisions in this will, that they be paid out of the real estate? These questions are of sober import, and will, probably, have an important bearing on the disposition of the testator's estate.

I proceed to consider the first question raised by the demurrer;

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Are the legacies a charge, by the terms of this will, upon the real estate? or, in other words, if the personal estate shall be insufficient, after payment of debts, to discharge the legacies, must they be lost to the legatees, or can they resort to the land devised in the residuary clause for their payment?

The general principle is undeniable, that the personal estate alone is liable for the payment of legacies, unless the land be charged with their payment by direct terms, or by fair and just implication. In this case there can be no pretence of a direct charge on the land; but it is insisted that such was the intention of the testator, from the terms used in the residuary clause, as well as from the whole scope and tenor of the will. The will was drawn, it is evident, by an intelligent person, acquainted with the use of words in their ordinary acceptation, and probably (as stated on the argument) by the testator himself. It is equally apparent, that the writer was unacquainted with technical legal phrases, and most probably, therefore, with many legal principles applicable to the subject of wills. The language in the residuary clause is not, after the payment of legacies, but after the payment of "my just debts and the expense of fulfilling this my last will and testament, I give," &c. This last clause, "the expense of fulfilling this my last will," it is contended, refers to legacies; but this view appears to me rather more ingenious than sound. It would be going very far, had the testator said, after payment of my just debts and fulfilling this my will, to have so considered it; but the term expense of fulfilling this my will, evidently refers only to the charges of the executors, and the contingent expenses incident to the execution of the will.

The plain and only reasonable view to be taken is, that the testator, after making the specific legacies, which had, no doubt, occupied his main thoughts in the disposition of his estate, recollected that his debts were to be paid, and the charges for the execution of the will, and after that the residue was to be disposed of. Having, therefore, finished the various legacies, he adds, most naturally, after my debts and the expense of fulfil-

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ing the will are paid, I give all that remains to my four cousins.

There is no devise of a specific farm to A., and another to B.; but it is a general devise of all the remainder of his property, both real and personal. There is a blending of the real and personal estate together, treating it as an entire thing, and making no distinction whatever in it. He clearly meant to give what remained, after the previous dispositions of the will had been satisfied. It is fairly to be inferred, that this testator either did not know, or the thought did not at the time occur to him, that the personal estate was alone applicable to the payment of legacies. The language used in the clause is, that the remainder, not of his land, not of his personal estate, but of his property generally, both real and personal, of whatsoever kind and description, should go to the residuary legatees and devisees. Probably a large majority of persons, and those of intelligence, have no other idea, than that their whole estate, as well land as personal property, must be disposed of in the discharge of the legacies bequeathed by their will. It would, indeed, be difficult to satisfy the language used in this instrument upon any other idea. It is the remainder only that is given of his real and personal estate, and yet this is the first disposition that he makes of any of his real estate. If the design was that his four cousins should take his lands, freed from any obligation except for the payment of his debts and the expenses of his executors, it would seem to me that the testator would have made a plain devise of them at once, and not in the form of a residuary clause. Besides, it is not a common course to fasten debts upon real estate; these, all know, are to be paid, and under our law cannot be passed by so long as property of any kind remains. The idea that the testator meant to blend his estate, and treat his personal and real estate as one common fund or property, is fortified by the clause in the will which immediately follows. Item, I wish that the house I have lately purchased of C. M. Campbell, valued at four thousand dollars, to be a part of my dear aunt's legacy." This was a distinct direction, that certain

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of his real estate, at a specified valuation, should be applied in payment of one of the previous legacies in the will, and that, too, immediately after he had made the residuary clause.

I state this, as the impression made on my mind, as to the intention of the testator, and that is to govern. We are not to make a new will, or to enter at all into the question, whether the disposition he has made of the property, be judicious or not, but if possible, to place such a construction upon it as to carry out his own views and object. Every man has a right to bestow his property when and how he pleases, and his meaning, is the grand point to be reached.

Thus far, it will be observed, I have been considering the will independent of adjudged cases. These have been furnished me by the industry of counsel on the argument, and it behoves us to look into them, and see what the light, experience and judgment of others have shed upon like cases.

The English authorities will be found collected in 1 *Roper on Legacies*, 448; they were cited and carefully examined at the hearing; they are far from being uniform, and depend much upon the language used in each will. In all, the intention is held to be the governing rule; in some, it is said, the charge shall be declared in favor of creditors and not legatees, while in others no such distinction is admitted. In most, a construction has been adopted favorable to the heir at law, while the simple fact of a devise in the form of a residuary clause, unaccompanied by any other circumstances, has not been sufficient to raise the charge; when the charge has been admitted also, it has been held that the personal estate must be resorted to in the first instance, and the land only looked to in aid of that fund. In *Lypet v. Carter*, 1 *Vesey, sen.* 500, the master of the rolls held the legacy a charge in favor of a daughter, whose portion would be lost without such construction. There the real estate was devised to a son, and no direct charge made upon it, but it was inferred from the whole will that such must have been the testator's intention. In *Alcock v. Sparhawk*, 2 *Vernon*, 228, the testator first devises his lands to his brother, in

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he ; he then gives a legacy of two hundred pounds to Susanna Jcock, to be paid by his executor within five years after his decease ; he then appoints his brother executor to his will, desiring him to see the same performed according to the trust and confidence that he reposed in him. There was no specific charge, and it upon the clause creating his brother executor, it was adjudged that the lands were liable to the payment of the legacy. The case of *Heath v. Heath*, 2 *Peere Williams*, 366, was the use of a direction given, that the legacies should be paid out of the real estate, and a gift of the personal estate to the testator's children ; there, as the personal estate was disposed of, the whole of the legacies were paid out of the real estate. In the case of *Walker v. Jackson*, 2 *Atkyns*, 624, lord Hardwicke declared the general rule to be, that the personal estate must be applied in the first place in payment of debts, but that a testator may substitute the real in the room of the personal estate ; and he held much to be the intention in that case, and the personal estate was exempt accordingly, and the debts charged upon another fund. In *Davis v. Gardiner*, 2 *Peere Williams*, 187, there were words independent of the clause devising the lands, showing an intention that the personal estate alone should pay the legacies, and it was so ordered ; this construction also was in favor of the heir. The case of *Kightly v. Kightly*, 2 *Vesey*, r. 328, proceeds wholly upon the ground that there is nothing on the face of the will, to show the testator's desire to charge the lands devised with the payment of legacies, and the master of the rolls forms his opinion from the general tenor of the instrument ; the words relied on to make out such intent, are those used in the first clause of the will, in which the testator directs all his legal debts, legacies and funeral expenses to be paid ; but the will then makes a number of specific devises, before the residuary clause, and it was adjudged that the complexion of the will evinced no intention that any other than the personal estate should be applied in discharge of debts and legacies. *Keeling v. Brown*, 5 *Vesey*, 359, is very similar to the last case cited. The reliance to show an intention to charge

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the lands, was on the first clause, in which the language is, "Imprimis, I will and direct, that all my just debts and funeral expenses be paid and discharged, as soon as conveniently may be after my decease, by my executors." Then follows a number of specific devises, with the ordinary residuary clause. It was held that the first clause was only a direction to the executors to discharge the debts and funeral expenses, without intending to change the fund out of which they were to be paid. In *Brudenell v. Boughten*, 2 *Atkyns*, 268, there were two wills. By the first, two specific pecuniary legacies were given, and then follows a devise of the remainder of the freehold and personal estate after payment of the debts and legacies. The last will revoked the former and reduced the legacies in amount, and by a residuary clause devised all the rest of the estate, real and personal, to the brother of testator, and appointed him executor. The first will was held by lord Hardwicke to be cancelled by the second, and that the legacies given by the second will were a charge on the real estate. The case of *Bench v. Biles*, 4 *Mad.* 187, referred to in *Powell on Devises*, 661, is still stronger. The testator gave all his personal and real estate to his wife, for life, and after her death he gave several legacies, and then all the rest, residue and remainder of his real and personal estate to his nephews; the legacies were charged on the real estate, and upon the ground that there was a blending of estates as one fund.

These are a few only of the English cases, cited on the argument, or which might be found bearing more or less on the question.

In this country the cases are also far from being uniform. In Pennsylvania, the residuary clause has been held of itself sufficient to indicate an intention that nothing should pass by it, but what remained, after all previous dispositions in the will were provided for. In Connecticut, their courts have not inclined to raise a charge except in the clearest cases: *Nichols v. Postlethwaite*, 2 *Dallas*, 131; *Hassenclever v. Tucker*, 2 *Binney*, 525; *Swift v. Edson*, 5 *Connecticut*, 531; *Gridley v. Andrews*, 8

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Connecticut, 1. In New-York, chancellor Kent, in *Lupton v. Lupton*, 2 John. Chan. 514, has reviewed some of the English cases, and placing himself upon the case before referred to, *Keeling v. Brown*, held that the mere residuary clause, without further indications on the face of the instrument, will not authorize a charge upon lands. In ordinary cases he considers the clause as the *formula* in the wills. This is, perhaps, the safest rule of construction, but it is by no means intended by that learned chancellor, that such a clause, coupled with other evidences of intention appearing on the will itself, may not be used in aid of such a construction.

I confess this examination of cases, while it exhibits the general rules of construction, has done little towards deciding the present cause. Indeed, it must be so in the nature of things. No will forms but a poor guide for another, and the introduction of one sentence, nay, of one word, will sometimes change the whole face of the instrument. Every will carries its own express.

After a full consideration of the will before me in all its parts, and referring with some care to the authorities cited on the argument, many of which I have deemed it unnecessary to state here, I have come to the decided conclusion that the testator designed to charge the lands devised in the residuary clause, with the payment of the debts and legacies, not as a primary fund, but in aid of the personal estate, if that should be exhausted. I think so, in the first place, from the general character of the whole instrument, by which it would appear, that the testator either knew no difference, or it did not occur to him at the time, between real and personal estate in the payment of legacies. In the second place, from the peculiar expressions used in the residuary clause, by which the remainder of his property alone, was to go to the devisees. In the third place, because the testator, at the time of making the residuary clause, which embraces his real estate, had not parted with one acre of

In the fourth place, from the clause directing that a house should, at a certain valuation, be a part of one of the legacies,

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furnishing evidence that the testator made no distinction in his own mind, in the application of his property to the purposes of the will, whether real or personal. And in the last place, from the character of the legacies themselves.

These legacies strike me as of no ordinary character. The testator had no immediate family, never having married, and was therefore at liberty to look round for those objects of affection and charity, which had been dear to him in life. To his aunt, Ann P. White, he seems to have felt the strongest attachment. She is first named in the will. He speaks of her as his dear aunt, and one who had the charge of him, and as I infer, of his branch of the family, and had acted the part of a kind and devoted mother. He is so careful of her as to provide her a house to live in, furniture to supply it, and a horse and chaise to ride in. With such manifestations of feeling, it would require a strong case to induce the belief that he did not intend this legacy should be paid, and that too at all hazards.

The testator was also a man of correct feeling; he remembers his faithful nurse, his relatives, and even the man who had befriended a brother in distress. He was also a man of strong religious feeling, and much interested in the cause. He gave legacies to advance the spread of the Gospel, not only at home, but in other states. He looked with evident pleasure upon his own church at Princeton, and while he remembered the place of his worship, was not unmindful of him who ministered at the altar.

These legacies were, from the language used, near the testator's heart. They were not made incidentally, and aside from the main disposition of his property, but were evidently the principal and grand objects he had in view. The devisees in the residuary clause, though doubtless persons for whom the testator must have had the highest respect and affection, yet they are stated to be his cousins, and in that respect were no nearer to him than most of the legatees, and in fact two of them are among the number of those who receive legacies.

The construction, therefore, which I place on this will, and

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I can bring my mind to no other, is, that the debts and expenses of executing the will are to be paid first from the personal estate, then the legacies, and in case of a deficiency, the land devised in the residuary clause may be resorted to.

This view renders it unnecessary to consider the second proposition stated in the argument.

Demurrer overruled, with costs.*

* From this decision, the residuary devisees appealed. The appeal was argued before the court of errors and appeals, upon both grounds of demurrer, at April term, eighteen hundred and forty-six, and the order of the chancellor reversed.

The following decree was made in that court:—

“ This cause coming on to be heard, upon an appeal from the decree of the chancellor, made the eleventh day of July, one thousand eight hundred and forty-three, overruling the demurrer filed in this case on the part of the appellants, to so much and such parts of the respondents' bill of complaint as charge that the legacies therein mentioned as bequeathed in and by the last will and testament of the said Samuel S. Olden, deceased, are chargeable upon the real estate of the said testator, if the personal estate of the said testator should prove insufficient for the payment of the said legacies; and also to so much and such parts of the said bill, as charge that in case the said legacies are not a charge upon the real estate, then that the debts of the said testator be, by the provisions of the said will, charged upon the said real estate. And the matter having been debated before the court, by William Halsted and Peter D. Vroom, of counsel with the appellants, and by Richard S. Field and William L. Dayton, of counsel with the respondents; and the court being of opinion that the legacies mentioned and bequeathed in the said will of the said testator, are not, nor are any of them, chargeable upon the real estate devised by the said testator, in and by his said will, in case the personal estate of the said testator should prove insufficient for the payment of the same; and also that the debts of the said testator are not, by the provisions of the said will, charged upon the said real estate, so as to entitle the said legatees to have the assets marshalled for the payment of the legacies, as in their said bill it is prayed, and that the said demurrer ought to have been allowed: It is, on this thirtieth day of April, in the term of April, in the year of our Lord one thousand eight hundred and forty-six, ordered, adjudged and decreed, that the said decree of the chancellor, overruling the said demurrer, be reversed, with costs, and that the said demurrer be allowed; and it is further ordered, that the record and proceedings in this cause be remitted to the court of chancery, to the end that the said court may proceed thereon according to the rules and practice of the said court.”

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY.

OCTOBER TERM, 1843.

The EXECUTORS of JOB JOHNSON v. WILLIAM KETCHUM et al.

After an award has been executed, the court will not set it aside upon the ground that the arbitrators were not sworn.

Where an account has been settled by arbitrators, and a bond and mortgage given for the sum awarded to be due, the court will not, except in case of gross wrong, permit the account to be re-investigated, or the validity of the award to be contested.

J. W. Miller and *Dayton*, for complainants.

Saxton and *W. Halsted*, for defendants.

Cases cited by complainants' counsel. 4 *Kent's Com.* 377; 2 *Ibid.* 208; 3 *Mer.* 704; 16 *Vesey*, 144; 5 *John.* 354.

Cases cited by defendants' counsel. 1 *Ld. Ray.* 133; 2 *Saund.* 337; *Cro. Eliz.* 4, 758; 5 *Coke*, 78, b.; *Salk.* 74; 1 *Chan. Cas.* 185; *Cro. Jac.* 639, 640; *Tidd on Awards*, 146, 249; 2 *Mass.* 164; 8 *Mass.* 399; 10 *Mass.* 442; 6

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bn. 13, 39 ; 11 *John*. 183 ; 13 *John*. 27, 187 ; 1 *Binney*, 108 ;
Arton, 122 ; 2 *Jac. Law Dic.* " *Dilapidation* ;" 22 *Viner's*
 434, 446 ; 11 *Coke*, 82.

THE CHANCELLOR. This bill is filed to foreclose a mortgage, given on the second of April, eighteen hundred and twenty-eight, by William Ketchum and wife, and Nathaniel Arton, to James Johnson, and by him assigned to Job Johnson. The mortgage was made to secure a bond between the parties, conditioned for the payment of two thousand two hundred and seventy-seven dollars and seventy-three cents, in year.

Two points are made by the defendants, Ketchum and Saxton in this case.

First, that the bond and mortgage were given for too much, a fraud practised on them at the time of their execution. The history of the transaction is somewhat curious, and there is enough in the case, unexplained, to create doubt and distrust in the minds of the defendants. The property mortgaged, as long to have been the subject of angry contention, and the cause an ejectment between John A. Johnson and James Johnson was pending in the court of appeals, a proposition for settlement was made, by which William Ketchum, the son-in-law of John A. Johnson, was to become the purchaser from James Johnson. By the agreement, he was to pay what James Johnson paid for the property, with interest, and to allow him a fair and full compensation for all permanent and substantial repairs which he had made on the premises while he occupied them, Johnson was to be charged with a fair rent. One half the amount was to be paid in cash, and the other half secured by mortgage on the property. The agreement was reduced to writing, and bears date the nineteenth of January, eighteen hundred and thirty-eight. Under this agreement, the parties paid the amount due to James Johnson, and on his statement of the price he paid for the property, at two thousand eight hundred and thirty-nine dollars and forty-three cents. This

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sum was, of course, the basis on which the present mortgage was given. It is now said by the defendants, that Johnson did not pay that amount for the property, but five hundred dollars less. This is a question of fact, and must depend on the proof. If this was the truth of the case, it undoubtedly should be rectified. After carefully looking into the papers and the evidence, I am not satisfied that any fraud has been practiced, but it would seem to me, that Johnson did give for the property, the very sum stated by him. He purchased from the Hickses. These gentlemen, who resided in the state of New-York, had a mortgage many years prior to this time, on the same premises, which premises are called the Tunison farm, and consist of one hundred and eighty-six acres, and also on another lot of thirty-three acres, called the Johnson lot. This mortgage was given by John A. Johnson, the then owner, and probably for money lent. The Hickses foreclosed their mortgage, and at the sheriff's sale became the purchasers. They did not want the land, but their money, and were anxious to sell the property again. While the Hicks mortgage was outstanding, unpaid, John A. Johnson, the owner of the equity of redemption, sold to Job Johnson, his brother, the thirty-three acres for full value, and got his pay for it, without giving information of the mortgage; who afterwards discovered that his land was subject to the Hicks mortgage and his money was lost. Job Johnson being thus circumstanced, applied to Job Halsted, esq., who conducted the business for the Hickses, and stated to him the situation in which he was placed. Mr. Halsted told him that the Hickses only wanted their money, and if they could sell the Tunison farm for what was due them, they would release the thirty-three acre lot to him. Job Johnson upon this, interested himself for the sale of the farm, and got his brother James to become the purchaser. The Hickses accordingly agreed to convey the Tunison farm to James Johnson for the amount due them, being two thousand eight hundred and thirty-nine dollars and forty-three cents, and by the same agreement, stipulated to quit claim the thirty-three acres to Job Johnson.

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The idea of the defendants is, that the thirty-three acres passed by the same consideration, and reduced the amount paid for the Tunison farm by the value of that lot, which was five hundred dollars. The whole case shows this was not so, but on the contrary, that James Johnson really paid the whole amount for the Tunison farm alone; the transaction was honorable and just in all respects. Job Johnson had been deceived by finding a mortgage on the lot he purchased, and the Hickses manifesting a proper spirit, agreed to give up their claim on his lot, if he procured a purchaser for the remainder, for an amount sufficient to pay their demand. The article of agreement between the Hickses and James Johnson, drawn up under the direction of Job S. Halsted, esquire, and signed by him in their behalf, fully establishes this view of the transaction. That agreement bears date the seventeenth of October, eighteen hundred and twenty-eight, and it distinctly binds the Hickses to sell the Tunison farm and nothing else, to James Johnson, for two thousand eight hundred and thirty-nine dollars and forty-three cents, one thousand dollars of which sum to be paid in cash, and the balance secured by a bond of Job and James Johnson, and a mortgage on the same property. The mortgage back did not cover the thirty-three acres. At the close of the agreement, and after every provision had been made relating to the sale with James Johnson, there is an independent clause, which stipulates that when this arrangement is completed, the Hickses will quit claim the thirty-three acres to Job Johnson. The papers show that the agreement was carried into effect precisely according to its terms. It must be borne in mind, that this agreement was made many years ago, and when no motive existed, so far as is known, for using any deception in its terms, or in the manner of drawing it up. The agreement would of itself, therefore, be sufficient to satisfy me of the true character of the transaction; but there is other evidence. Job S. Halsted, who is a cautious witness, and especially so in speaking of transactions of many years standing, yet is sufficiently explicit to show that his impressions are all with this view of the subject.

But further, after the present bill was filed, the defendants filed a cross bill for the purpose of obtaining an injunction, to prevent the defendant, Job Johnson, from prosecuting the bond and mortgage at law, pending this suit, and set out substantially the same facts as are contained in their answer. To that cross bill, both Job Johnson and James Johnson filed a full answer under oath, declaring the transaction to be in conformity with the written agreement, and that James Johnson did pay all the money for the Tunison farm alone. They are entitled to the benefit of that answer. This answer explains, too, another part of the case: the deed from the Hickses to James Johnson, covers both lots, and then James Johnson conveys to Job the thirty-three acres. This is different from the agreement, and unexplained, would favor the view taken by the defendants; but they both swear it was so done merely to save the necessity of the Hickses making two deeds, and that the consideration of one hundred dollars named in the deed from James to Job, was never paid or intended to be, but was placed there alone to comply with the forms of law. My impressions from the pleadings and evidence being, that James Johnson paid for the Tunison farm alone, the sum stated by him, and which is carried into the mortgage, the first objection taken by the defendants must fail.

The second point urged by the defendants, has grown out of the second clause in the agreement of the nineteenth of January, eighteen hundred and thirty-eight. In adjusting the amount, William Ketchum was to pay James Johnson for the Tunison farm; this clause provided that James Johnson should be allowed "a fair and full compensation for all permanent and substantial repairs which he had made on the said premises while he occupied the same, and allow a fair and full rent for the said premises while he held and occupied the same," to be ascertained, in case of dispute, by two respectable men, to be chosen one by each party, and if they could not agree, those two were to choose a third. The parties, Ketchum and Johnson, got together to carry out this part of the agreement, and

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being able to agree, each selected a man, and they not
ing, chose a third, who finally settled the amount that
ion should be allowed for repairs and charged for rent up-
his clause, and reduced the same to writing in the shape of
ward. This award is, I find, signed by all the men. It is
objected by the defendants, that the arbitrators were not
, that no witnesses were examined, and that the allow-
made in favor of Johnson was illegal and unjust. It is
ly too late, in my opinion, at this time, to open this ad-
ent, and undertake to go into this account; it would be
; encouragement to perpetual litigation and strife. These
met in a friendly spirit, selected respectable men, looked
he accounts, made their representations on both sides, the
ators being neighbors, understood much of their own know-
, of the repairs which Johnson had made, and finally they
itted to the result to which the men arrived. The award
made on the sixth of February, and on the second of April
after, (nearly two months having intervened,) these de-
nts gave their bond and mortgage on the basis of this
1. The bond and mortgage was subsequently assigned by
s to Job Johnson, and when he prosecutes on it and at-
s to recover the money, the defendants propose again to
the whole question and to go back to the consideration of
e matters settled by the arbitrators. The parties executed
ward and acquiesced in the result, and should not be per-
d to go into it again. If the defendants intended to dis-
the doings of the arbitrators and the validity of their award,
should have done so before giving the bond and mortgage.
consummated the agreement, however, and the defend-
went into possession of the premises. I do not mean to be
stood as denying the power of this court to open this ac-
; in case of gross wrong, but it should certainly be a very
g case.

do not perceive that a case of that character is here pre-
d. There may have been some items not allowable under
strict legal construction of the terms of the contract, and yet

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it is more than probable they came within the contemplation of the parties themselves. The design in the settlement was, undoubtedly, to reimburse Johnson for the cost and outlay on the property. The amount claimed by him, was reduced in almost every item, by the arbitrators, and the subject generally seems to have received from them an upright and careful consideration. To open it all again, I must think, would be oppressive and give undue encouragement to litigation.

There being, therefore, in my opinion, nothing in either of the grounds assumed by the defendants, the complainants are entitled to a decree for the amount due on their mortgage, what the same shall be ascertained by a master. There will be reference accordingly.

**WILLIAM KETCHUM v. The EXECUTORS of JOB JOHNSON
et al.**

The party calling the subscribing witness to an instrument, is not concluded by his evidence, and if the witness deny the execution of the instrument, other witnesses may be called to establish it.

A mere equity cannot be sold by virtue of an execution at law.

It seems that the equity of redemption of the mortgagor cannot be sold upon an execution at law after the mortgagee has been let into possession.

BILL for redemption. The bill was originally filed against Job Johnson, in his lifetime. It charges, that on or about the seventh day of February, eighteen hundred and twenty, Job Johnson, having loaned to his brother, John A. Johnson, the sum eight hundred and five dollars, the said John A. Johnson, in order to secure the repayment of the said loan, with interest, made and executed to the said Job Johnson a deed of conveyance, in fee simple, for a tract of land containing forty acres and one rood. That at the time of the execution of the said deed, the said Job Johnson, by way of condition or defeasance

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the said deed, made and executed, under his hand and seal, the following instrument of writing, to wit :

"Articles of agreement, made the seventh day of February, in the year of our Lord eighteen hundred and twenty, between Job Johnson, of the township of Independence, in the county of Sussex, and state of New-Jersey, of the first part, and John A. Johnson, of the same place, of the second part, witnesseth, that the said John A. Johnson, of the second part, did execute a certain deed of indenture, for a certain lot or parcel of land, containing forty acres and one rood, be the same more or less, for the sum of eight hundred and five dollars, and bearing even date with this article : Now it is the true intent and meaning of this article, that if at any time hereafter the said John A. Johnson, his heirs, executors, administrators, or any of them, shall well and truly pay back unto the said Job Johnson the purchase money above mentioned, the said Job Johnson doth agree with himself, his heirs, executors or administrators, to convey back the above bargained lot ; and to the true performance of the above, the said Job Johnson, of the first, doth bind himself, his heirs, executors, and every of them, in the penal sum of sixteen hundred and ten dollars."

That on or about the first of April, eighteen hundred and twenty, the said defendant, under and by virtue of the said deed of conveyance, entered into possession of the said premises, and hath ever since received and taken the rents, issues and profits thereof to his own use. That on the eleventh of May, eighteen hundred and twenty-four, judgment was rendered in the supreme court of this state, in favor of Peter Apgar, against the said John A. Johnson and one C. L. ; that by virtue of a writ of execution issued upon the said judgment, the sheriff of the county of Sussex levied upon and exposed to sale all the right, title and interest of the said John A. Johnson in the said tract of land ; and that on the sixth day of July, eighteen hundred and thirty-nine, the same was by the said sheriff struck off and sold to the complainant ; and that by deed of indenture bearing date on the sixteenth day of the same month of July,

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the said lot of land, and all the right, title and interest of the said John A. Johnson therein, was, in pursuance of the said sale, conveyed to the complainant.

The bill states, that by virtue of said conveyance the complainant is entitled to redeem the said premises; and prays that he may be permitted to redeem the same, and that the defendant may be decreed to reconvey the premises, upon the payment of the principal money so lent, with interest, after deducting the rents, issues and profits received by the defendant.

The defendant, Job Johnson, by his answer, denies that the deed in the complainant's bill specified, was executed to him by way of mortgage, or as security for the re-payment of a loan, but states that the said conveyance was made and intended as an absolute conveyance for the price therein specified, and for that amount of money previously and then due and owing from the complainant to the defendant. Denies the making of any loan, or that he ever executed the instrument of writing charged as a defeasance in the complainant's bill; alleges that the defendant entered into possession of the said premises immediately after the execution of the said deed, having paid a full and adequate price; that he has ever since used and enjoyed the same as his own property, and that he has from time to time built and put upon the said premises, various buildings and permanent improvements, at a cost of about eight hundred dollars. That by means of these improvements, and the general rise of property, the land now far exceeds in value its original cost. That the said buildings were erected and improvements made upon the said premises, with the full knowledge of the complainant, who never pretended to the defendant or to any other person, to the defendant's knowledge, that he had any right or interest in the same.

That the complainant, at the term of February, eighteen hundred and thirty-four, applied for his discharge as an insolvent debtor, and was discharged upon the said application; that the inventory of his property, filed by the complainant, upon his said application, contains no account of any interest,

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claim or demand in or to the said tract of land so sold to the defendant. Job Johnson having died after answer filed, the suit was continued against his executors. Final hearing upon bill, answer, replication and proofs.

Saxton and *W. Halsted*, for complainant.

An absolute deed with a defeasance constitutes a mortgage: 1 *Vernon*, 84; 2 *John. Chan.* 189; *Saxton*, 534; 1 *Green's Ann.* 264; 15 *Viner's Ab.* 472; 3 *Wendell*, 213.

The deed and defeasance executed in this case, constitute a mortgage: 1 *Peere W.* 270; 4 *Mass.* 443; 3 *Atkyns*, 280; 4 *Kent's Com.* 129; 1 *Wash.* 14; 5 *Binney*, 499; 9 *Wheat.* 489.

The equity of redemption may be sold, notwithstanding the mortgagor is out of possession: *Halsted's Dig.* "Equity of Redemption;" 3 *Hals.* 313; 1 *South.* 277; 1 *Vernon*, 447, 188; 4 *Kent's Com.* 154, 126; 2 *Pick.* 276; 5 *Har. and John.* 312; 1 *Conn.* 563; 4 *Conn.* 235; 5 *Conn.* 592.

A mortgagee in possession, cannot claim an allowance for permanent improvements made by him on the mortgaged premises: *Saxton*, 138.

J. W. Miller and *Dayton*, for defendants.

The contract between the parties was a mere agreement to convey. It did not constitute a mortgage: 2 *Story's Eq.* 287; 4 *Kent's Com.* 141, 4; 1 *Powell on Mort.* 138, note T; 5 *Paige*, 480; 1 *Fonb. Eq.* 262, 3, note H; 3 *Paige*, 421; 1 *John. Chan.* 40; 12 *Vesey*, 332; 19 *Vesey*, 412; 2 *Atkyns*, 496; 2 *Freeman*, 150; 7 *Cranch*, 218; *Coote on Mort.* 33, 4.

A mortgagee in possession by the consent of the mortgagor, is entitled to compensation for his improvements: 4 *Kent's Com.* 167; 19 *Vesey*, 413; 7 *Cranch*, 218; 5 *Paige*, 9.

A mortgagor out of possession, has no interest which can be sold under an execution at law: 7 *John.* 282; 5 *Hals.* 193, 202; 4 *Kent's Com.* 160; 1 *Caine's C. E.* 46; 4 *John.* 42; *Saxton*, 293; *Story on Bailments*, 239; 4 *Cowen*, 461.

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THE CHANCELLOR. John A. Johnson, of the township of Independence, in the county of Sussex, by deed dated the seventh of February, eighteen hundred and twenty, conveyed to his brother, Job Johnson, a lot of land situated in that township, containing forty acres. The deed is absolute on its face, and states the consideration to be eight hundred and five dollars. It is, however, the real character of the transaction, that creates the dispute. The complainant charging in his bill, that the deed was designed as a mere security for the loan of money, and that a defeasance was executed by the grantee at the time he received it, by which a power of redemption in the nature of a mortgage was given to the grantor. The defendant, on the other hand, insists by his answer, that it was a sale of the entire interest, absolute in its character, and without any agreement whatever for redemption or repurchase of the premises. Much of the evidence in the cause is taken on this point, and I am entirely satisfied that the writing marked exhibit B., on the part of the complainant, providing for a reconveyance of the property on certain terms, was executed by Job Johnson, at the time he took the deed, and is to be considered as part and parcel of the same contract. The two papers bear the same date, appear to have been drawn up by the same person, and the handwriting of Job Johnson to the defeasance is incontestibly proven. All the witnesses agree that the handwriting is Job Johnson's, and some of them are men of business and competent judges. The subscribing witness, it is true, while he admits that he signed the paper, declares that Job Johnson did not sign it in his presence, and had not signed it when he placed his name to it. This may be so, and yet, in a transaction of twenty years standing, it is not safe to trust to the memory upon a subject like that. There is another witness, (Phebe Quick,) who declares that she saw Job Johnson and the witness sign the paper; that the witness did not see Johnson sign the paper, but came in directly after and affixed his name to it. It is most probable, the witness has some indistinct idea that he did not see Johnson sign the paper, but be that as it may, it is clearly mani-

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fact that Johnson did sign it, for his handwriting seems to have been well known, and is testified to by many and very respectable witnesses, by men who had opportunities of knowing his handwriting, and there is not one person brought to deny the genuineness of the signature. While it is a settled rule of law, that the subscribing witness, if within the reach of the process of the court, must be called to testify; yet when he is so called, the party is not bound by his oath alone, should he deny the execution, but he may call other witnesses and prove the handwriting of the party to the instrument.

The writing being thus proven, what is its character? The complainant calls it a defeasance, in the nature of a mortgage, while the defendants consider it a contract for repurchase upon certain terms. It is often difficult to decide this question; the distinctions are nice and depend on the peculiar circumstances of the case. I incline to the opinion strongly, that the true and just construction of this instrument is, to consider it a contract for repurchase. The sale was made at a specified price, and is absolute on its face; the possession was taken immediately by the purchaser; it does not appear to have been given for a loan of money, but in satisfaction, and that in part only, of a previous indebtedness. The conduct of the parties show this to have been their view, for Job Johnson went on and made valuable improvements on the land, built a barn and other buildings, planted an orchard, and put up stone fences in the presence of John A. Johnson, who was his brother, and without any question being raised by him respecting his right to do so. It appears too, that in eighteen hundred and thirty-four, John A. Johnson took the benefit of the insolvent act, and in the schedule of his property, made under oath, no mention is made of this. The sale to the defendant was made on the seventh of February, eighteen hundred and twenty, and he went into possession within a very short time thereafter, perhaps a month or two, and acted as the owner, making essential improvements in the property, until the sixth of July, eighteen hundred and thirty-nine, (a period of more than nineteen years,) when the

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iff of Sussex sold to the complainant for fifty dollars, all the lot of John A. Johnson, his father-in-law, in the said forty lot, by an execution issued on an old judgment in favor of Peter Apgar, against the said John A. Johnson and Christopher Ketchum, entered in the supreme court in May term, eighteen hundred and twenty-four. The defendant gave a full price for the land when he bought, and any present increased value, is derived from the improvements he placed upon it, and the gradual increase of property in that part of the country. The complainant, it will be observed, is not a creditor of John A. Johnson, nor has he any transfer from him of his right, but claims as a voluntary purchaser for a nominal price, to redeem the land by paying off anything that may remain due on the consideration of eight hundred and five dollars, paid by the defendant, after deducting the rents, issues and profits. It is plain from the bill, that the complainant's belief is, that the rents, issues and profits of the land, and which arise mainly from the improvements placed upon it, will pay off the whole debt, and leave him the property clear.

"There is nothing in the case that should prompt me to aid in any such result. After so long a time has passed by, after the value of the premises have been increased by the labor and money of the defendant, I should with very great reluctance deprive him of the reward due to his industry, and bestow it on one having no higher claim than that presented by the complainant. In any event, even if the party himself was seeking to redeem, he should, under the circumstances of this case, pay for all the improvements which the defendant has made on the property.

But the complainant has no right to redeem this property. He acquired no right by his purchase at the sheriff's sale, that can be recognized in this court. The title to this land passed to the defendant's testator in eighteen hundred and twenty, and with it the possession also. The judgment under which the sale took place, was not entered until eighteen hundred and twenty-four, four years afterwards. There was then nothing

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which could be sold on an execution at law; the title was gone from the defendant in execution, and the possession also, and nothing remained but a mere equity.

By the English law, the equity of redemption, even if the mortgagor remain in possession, cannot be sold on execution at law, but in this country it is otherwise. The mortgage is deemed with us a mere security for a debt, and the property may be sold by execution, subject to the lien. It may well be doubted, however, whether this is so when the mortgagee is in possession, for if the mortgagor surrenders that, the position of things is materially changed. The entry by the mortgagee or a foreclosure, puts a new aspect on the rights of the parties. Before entry or foreclosure, it is held that the equity of redemption may be sold on execution against the mortgagor, but not after. Then the legal title in the mortgagee becomes the subject of a sale by execution against him. This is the doctrine recognized in *Jackson v. Willard*, 4 John. 42; *Collins v. Torrey*, 7 John. 282; 4 *Kent's Com.* 160, 1.

But whatever uncertainty there might be in the case of a mortgage, I think there can be none in a mere contract like the present, for a repurchase of the premises; that is a clear naked equity, and cannot be sold by execution at law. It comes within the principle of the cases in this court, of *Disborough v. Outcalt and others*, Saxton, 301; of *Vancleve v. Groves and others*; and of *Den v. Steelman*, 5 Halsted, 193, in the supreme court of this state.

The complainant's bill must be dismissed, with costs.

WILHEM WILLINK, junior, v. The MORRIS CANAL AND
BANKING COMPANY and others.

The undeniable general rule in equity is, that a nominal trustee cannot bring a suit in his own name, but must join with him the names of the persons having the beneficial interest.

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But the court will, in its discretion, dispense with a strict adherence to the rule, where by complying with it, great inconvenience or unnecessary expense would be incurred.

Where a banker negotiated in the city of Amsterdam a loan of seven hundred and fifty thousand dollars, for the Morris Canal and Banking Company, and the company, to secure the repayment of the loan, executed a mortgage to the said banker, "being the agent and trustee of the several subscribers to the loan," reciting that the loan was to be advanced by the subscribers thereto according to the sums subscribed by each of them respectively, and that the principal and interest thereby secured should be paid in Amsterdam to the said banker, "*representing the said lenders*, or to his successor or successors in the said trust, or to such person or persons as he or they might substitute or appoint for that purpose;"—*Held*, that the mortgagee might file a bill to foreclose the mortgage in his own name, without making his *cestui que trusts* parties.

The case is excepted out of the general rule, on the ground of the great inconvenience to which a compliance with it would subject the complainant.

The true additional parties, if any, would be the owners of the stock at the time of filing the bill. To require them to be made parties would be almost a denial of the aid of the court.

Nor is it necessary that the complainant should state upon the face of his bill, in order to warrant the filing of the bill in his own name, that the *cestui que trusts* are so numerous that they cannot, without great inconvenience, be brought before the court. The character of the transaction sufficiently appears upon the face of the mortgage, as disclosed in the bill.

Held, also, that it was a part of the original contract between the mortgagor and mortgagee, that the lenders should in this transaction be represented by the mortgagee, and by him alone. The court will not, therefore, oblige him, in seeking to recover the money, in the face of this agreement, to come into court in the names of all the lenders.

The assignee of a bankrupt or an insolvent is a necessary party to a bill affecting the property of such bankrupt or insolvent, because the property by the assignment passes to and vests in the assignee.

Are the receivers, appointed under the act, entitled, "An act to prevent frauds by incorporated companies," necessary parties to a bill affecting the property of the company of which they are appointed the receivers?—*Quere*.

The property of the company does not vest in the receivers, nor does the appointment of receivers necessarily put an end to the corporation.

The title to the property is not changed by the appointment of the receivers. A power only is delegated to the receivers to take charge of it and sell it.

It seems that the receivers may sue or defend in the name of the corporation.

Where the receivers were appointed after a decree *pro confesso* had been taken

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against the corporation, by which the right of the complainant to recover was established, *Held*, that the receivers were not necessary parties, and that an objection made by a third party to the bill for want of proper parties on that ground, would not be sustained.

If the receivers should ask to be substituted as defendants, with the view of setting up a defence, the court would permit them to do so at any stage of the proceedings.

Upon a bill of foreclosure, a subsequent mortgagee upon the same premises, though a mere trustee, is a necessary party. It is not enough that the *cestui que trusts* are before the court.

But where the property subject to the subsequent mortgage was small, and the *cestui que trusts* were before the court, an objection for want of parties, on the ground that the trustee was not a party, was overruled, inasmuch as the right of the trustee to redeem would not be bound by the decree.

By the act incorporating the Morris Canal and Banking Company, they were authorized to construct a canal to connect the waters of the Delaware with the waters of the Passaic. By a subsequent act, the company were authorized "to continue the Morris canal to the waters of the Hudson, at or near Jersey City." By an act passed January twenty-eighth, eighteen hundred and thirty, the company were authorized to borrow money, and for securing the due payment thereof, to hypothecate by way of trust, mortgage or otherwise, "the Morris canal, with all its privileges, appendages and appertinances, and all the property and chartered rights of the said company." The company having made a loan, executed a mortgage, by authority of the said act, "upon all and singular the Morris canal, so called, being the canal authorized by the laws of the state of New-Jersey, as the said canal has been laid out, through the several counties of Warren, Sussex, Morris, Essex and Bergen, in the said state of New-Jersey, and being now in a course of completion from the Delaware to the Hudson river; together with all and singular the dams, aqueducts, locks, planes, culverts, bridges, towing-paths, embankments, basins, wharves, docks, waters, water-courses, machinery, privileges, appendages and appertinances thereto belonging or appertaining." At the time of the execution of the mortgage, the canal had not been constructed from the Passaic to the Hudson, nor had the land been purchased upon which the canal was subsequently constructed. The route had been surveyed, though a part of the route was subsequently varied.

Held, That the said mortgage covered the entire canal from the Delaware to the Hudson, and also the pier at Jersey City, which was constructed upon land purchased after the execution of the mortgage.

Held, also, That the feeder of the canal passed by the said mortgage as part and parcel thereof.

If a subsequent mortgagee, or his agent, had notice of the existence of a mortgage from the Delaware to the Passaic, it was sufficient to put him up-

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on inquiry, and the first mortgagee will be entitled to priority upon the whole canal, although his mortgage was not duly acknowledged or proved and recorded.

Held, That the legislature, by giving authority to the company to execute a mortgage, intended to invest the mortgagee with all the power and authority incident to an instrument of that kind, and that although no express authority is given by the statute to sell the premises by virtue of the said mortgage, a power of sale is to be inferred from the authority to mortgage.

THE complainant, on the twentieth day of October, eighteen hundred and forty-one, filed his bill of complaint for foreclosure, sale, &c., on a mortgage made and executed to him, by "The Morris Canal and Banking Company," an incorporated company of the state of New-Jersey.

The bill sets out the original act incorporating the said company, passed the thirty-first day of December, eighteen hundred and twenty-four, and the several supplements thereto, and more particularly the supplement passed the twenty-eighth of January, eighteen hundred and thirty, entitled, "An act to amend an act, entitled, 'An act to incorporate a company to form an artificial navigation between the Passaic and Delaware rivers, passed the thirty-first day of December, eighteen hundred and twenty-four,' and for other purposes."

The bill then states, that after the passage of the said last mentioned act, the complainant, by the request and in pursuance of the authority and instructions of the board of directors of the said The Morris Canal and Banking Company, did in behalf of the said company, and for their use, negotiate a loan in the city of Amsterdam aforesaid, of seven hundred and fifty thousand dollars, which sum was handed or paid over to the said company; and the said The Morris Canal and Banking Company, for the purpose of securing the re-payment of the said capital sum of seven hundred and fifty thousand dollars, with interest on the same, made and executed in due form of law, and delivered to the complainant, their certain indenture of mortgage, bearing date the twenty-ninth day of March, in the year of our Lord one thousand eight hundred and thirty,

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and made between the said The Morris Canal and Banking Company, of the first part, and the complainant, by the name and description of Wilhem Willink, junior, of the city of Amsterdam, in the kingdom of the Netherlands, merchant, being the agent and trustee of the several subscribers to the loan therein after mentioned, of the second part; and in and by the said indenture of mortgage it is recited and set forth, that whereas the complainant, in pursuance of the authority and instruction of the board of directors of the Morris Canal and Banking Company, had on behalf of the said company lately negotiated and concluded in the said city of Amsterdam, an agreement for a loan of seven hundred and fifty thousand dollars, to be advanced by the subscribers thereto according to the sums subscribed by each of them respectively, by the conditions of which agreement, the said loan was to bear interest at the rate of five per centum per annum, to be paid half-yearly, that is to say, on the first day of July and on the first day of January in each year until its reimbursement; and the capital sum to be reimbursed by five equal annual installments, commencing the first day of January, in the year of our Lord one thousand eight hundred and forty-six; and that the said interest, and also the said installments of principal, should be paid in Amsterdam to the complainant, representing the said lenders, or to his successor or successors in the said trust, or to such person or persons as he or they might substitute or appoint for that purpose; and that the payment thereof should be secured by the pledge and hypothecation of the Morris Canal belonging to the said company, with its appendages and appertenances, and the annual revenues, chartered rights and property of the said company therein after mentioned; and that the said conditions had been approved and confirmed by the board of directors of the said company; and thereupon the said indenture of mortgage witnessed that the said "The Morris Canal and Banking Company," for the purpose of securing the reimbursement of the said capital sum, and the due payment of the said interest, according to the conditions of the said agreement, and in consider-

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ation of the sum of one dollar, to them in hand paid by the complainant, the receipt whereof was thereby acknowledged, and in pursuance of the power and authority for that purpose given and granted to them by the laws of the said state of New-Jersey, had granted, bargained, sold, assigned, transferred and set over, and by the said indenture of mortgage did grant, bargain, sell, assign, transfer and set over unto the complainant, his heirs, executors, administrators, successors, substitutes and assigns, for the benefit of the said lenders, all and singular the said Morris Canal, so called, being the canal authorized by the laws of the state of New-Jersey, as the canal had been laid out, through the several counties of Warren, Sussex, Morris, Essex and Bergen, in the said state of New-Jersey; and being then in a course of completion from the Delaware to the Hudson river, together with all and singular the dams, aqueducts, locks, planes, culverts, bridges, towing-paths, embankments, basins, wharves, docks, waters, water-courses, machinery, privileges, appendages and appertenances thereto belonging or appertaining, and also the chartered rights of the said company, and all the tolls, income, revenues and profits accruing, or which should or might at any time thereafter accrue or arise from the said canal; and also all the lands, tenements and other properties of them The Morris Canal and Banking Company, whatsoever and whosoever, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and of every part and parcel thereof, and all the estate, right, title, interest, property, claim and demand, as well at law as in equity, of them The Morris Canal and Banking Company, of, in and to the same, and every part and parcel thereof; to have and to hold all and singular the said granted and assigned premises unto the complainant, his heirs, executors, administrators, successors, substitutes and assigns, to his and their proper use and benefit, as fully and effectually, to all intents and purposes, as they The Morris Canal and Banking Company were seized, possessed or entitled unto, or could in any manner grant, convey, assign and transfer the same—upon trust, nevertheless, for the benefit and

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of of the several lenders, their respective executors, administrators and assigns, in proportion to the sums by them respectively advanced, or to be advanced, on account of the said loan ; ded always, and the said indenture of mortgage was and on the condition, that if the said The Morris Canal and Banking Company, or their successors, should well and truly to the complainant, his executors, administrators and assigns, representing the said lenders, or to his successor or successors in that trust, or to such person or persons as he or they should substitute and appoint for the receipt of the same, the said capital sum of seven hundred and fifty thousand dollars by five equal annual installments, commencing on the first of January, in the year of our Lord one thousand eight hundred and forty-six, and also the annual interest on so much of said capital sum as should from time to time remain unexercised and not reimbursed, to be computed at the rate of five per centum per annum, and to be paid half-yearly, that is to say on the first day of July next succeeding the date of said indenture of mortgage, and half-yearly thereafter ; such reimbursement of said capital sum, and such half-yearly payments of interest, to be made in the said city of Amsterdam ; then that said indenture of mortgage, and the estate thereby granted, and every act, matter and thing therein contained, should cease to be null and void to all intents and purposes ; and the said Morris Canal and Banking Company, for themselves and their successors, by the said indenture of mortgage, did covenant, promise and agree to and with the complainant, his executors, administrators, substitutes and assigns, representing the said lenders, that they the said Morris Canal and Banking Company, and their successors, should and would well and truly reimburse, pay and discharge the said principal sum and interest, at the times and in the manner in the said indenture of mortgage specified, and herein before set forth ; and it was also in the said indenture of mortgage expressly declared and agreed upon between the parties thereto, that if default should at any time be made in the payment of the said capital sum and in-

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terest, or either of them, or any part thereof, according to the true intent and meaning of the said indenture of mortgage, then and in that case, and as often as such default should be made, it should be lawful for the complainant, his heirs, executors, substitutes or assigns, representing the said lenders, or such person or persons as shall or may have succeeded to the said trust, to enter upon and to have, hold, use and enjoy, the said canal, with its appendages and appertenances, and all and every of the premises granted and assigned by the said indenture of mortgage, and to take and receive the revenues, tolls, rents, issues and profits thereof, in as full and ample a manner, to all intents and purposes, as they the said Morris Canal and Banking Company, or the stockholders thereof, could or might, have, hold, use, enjoy, take and receive the same.

That on the twenty-ninth day of March, in the year of our Lord one thousand eight hundred and thirty, before William H. Maxwell, a commissioner to take the acknowledgment of deeds, &c., personally appeared Cadwallader D. Colden, with whom the said commissioner was personally acquainted, and who was known to said commissioner to be the president of the corporation styled "The Morris Canal and Banking Company," the grantors named in the said indenture, and who as such president is a subscribing witness to the execution of the said indenture; and the said commissioner having first made known to him the contents of said indenture, and the said Cadwallader D. Colden being by said commissioner duly sworn, did depose and say, that the seal affixed to said indenture was the corporate seal of the said company, that the same was so affixed thereto by the authority and order of the board of directors of the said company, and that he as such president subscribed his name as a witness to such execution.

That on the — day of March, in the year of our Lord one thousand eight hundred and thirty, the said indenture of mortgage was duly entered of record in the office of the secretary of state of the state of New-Jersey.

That the interest on the said capital sum of seven hundred

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and fifty thousand dollars, mentioned in the said indenture of mortgage, and intended to be secured thereby, has been paid by the said "The Morris Canal and Banking Company" up to the first day of January, in the year of our Lord one thousand eight hundred and forty-one; that one half-year's interest on the said capital sum of money became due and payable on the first day of July last, according to the conditions of the said indenture of mortgage; that the same amounts to the sum of eighteen thousand seven hundred and fifty dollars; that the same, or any part thereof, has not been paid or satisfied; that the whole amount of the said capital sum of seven hundred and fifty thousand dollars, with interest for the same from the first day of January, eighteen hundred and forty-one, remains unpaid and unsatisfied.

That the said The Morris Canal and Banking Company have at all times possessed and enjoyed, and that the said company do still possess and enjoy, all and singular the said canal and the said mortgaged lands and premises, appendages and appertenances, and chartered rights of said company, and that they have always received, and still do receive, the rents, issues and profits thereof.

That the complainant has been informed and believes, that the said The Morris Canal and Banking Company, by their certain indenture of mortgage, bearing date the seventh day of October, eighteen hundred and forty, mortgaged to the State of Indiana, one of the United States of America, all the several tracts or parcels of land and premises, situated, lying and being in the counties of Warren, Sussex, Morris, Passaic, Essex and Hudson, constituting the Morris Canal from the Delaware river to the Hudson river, together with all the lands, locks, inclined planes, docks, wharves and appertenances thereunto belonging, and being part of the premises mortgaged to the complainants as aforesaid; which said mortgage appears to be conditioned for the payment of nine hundred and sixty thousand dollars, and for the payment of certain other sums of money, and for the return of certain stocks, and for the delivery of a certain quan-

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tity of iron, as in said mortgage mentioned and set forth ; but the complainant insists and charges, that the said indenture of mortgage to the State of Indiana, is subsequent in date and registry to the complainant's mortgage, and that the complainant's mortgage is entitled to priority in payment over the same.

That the complainant has been informed and believes, that the said " The Morris Canal and Banking Company have executed and delivered to the State of Indiana a certain other mortgage, bearing date on or about the sixth day of October, in the year eighteen hundred and forty, which mortgage purports to be of and for the Morris Canal from Newark to Jersey City, with the appertenances, lands, docks and wharves, and being also for part of the premises mortgaged to the complainant, as aforesaid, and is conditioned for the delivery by the said Morris Canal and Banking Company to the said State of Indiana, of one hundred and ninety thousand dollars of the five per cent Indiana sterling bonds, according to contract between the parties; that is to say, forty thousand dollars on the first day of January, eighteen hundred and forty-one; fifty thousand dollars on the first day of July, eighteen hundred and for-one; fifty thousand dollars on the first day of January, eighteen hundred and forty-two; and fifty thousand dollars on the first day of July, eighteen hundred and forty-two; but the complainant insists, that the said last mentioned mortgage is subsequent in date and registry to the complainant's said mortgage, and that the complainant's mortgage is entitled to priority in payment over the same."

The bill then sets out several judgments against the said " The Morris Canal and Banking Company ;" one in the supreme court of judicature of the state of New-Jersey, in the term of September, eighteen hundred and forty-one, for eleven thousand dollars and upwards, besides costs, in favor of William Curtis Noyes, Thomas G. Talmadge and Henry Yates ; a judgment in the said supreme court against the said company, in the same term of September, in favor of Abraham Richards and

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David Selden, for the sum of thirty-nine thousand three hundred and ninety-five dollars and fifteen cents, or thereabouts, besides costs of said suit, and which remain uncanceled of record.

The prayer of the bill is, that the said, "The Morris Canal and Banking Company" may be decreed to pay to the complainant, as such trustee, as aforesaid, the said principal sum of seven hundred and fifty thousand dollars, mentioned in and intended to be secured by his said indenture of mortgage, and also the said sum of eighteen thousand seven hundred and fifty dollars of interest money due on the said principal sum as aforesaid, with the difference in the rate of exchange between the city of New-York and the city of Amsterdam, where the said sums are payable, and all interest moneys to grow due on the aforesaid principal sum, with the difference of exchange as aforesaid, together with all the complainant's costs and charges in this behalf sustained, by a short day to be appointed by this honorable court, and in default thereof that the said defendants, and each of them, and all persons claiming or to claim under them or either of them, may be foreclosed of and from all equity of redemption and claim of, in and to all and singular the said mortgaged premises mentioned and contained in the complainant's said indenture of mortgage, and every part and parcel thereof, with the appertenances, and may deliver over unto the complainant all deeds, demises, writings, books, records and archives relating to or concerning the same, and that all and singular the said canal of the Morris Canal and Banking Company, together with all and singular the dams, aqueducts, locks, planes, culverts, bridges, towing-paths, embankments, basins, wharves, docks, waters, water-courses, machinery, privileges, appendages and appertenances thereto belonging or appertaining, and all the chartered rights of the said company, and all the tolls, income, revenues and profits accruing, or which at any time hereafter shall or may accrue or arise from the said canal; and also all the lands, tenements and other properties of them the said Morris Canal and Banking Company, whatsoever

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and wheresoever, and whereof the said company was seized or possessed on the said twenty-ninth day of March, eighteen hundred and thirty, the time of the date and execution of the complainant's said indenture of mortgage, and mentioned and contained in or comprehended thereby, may by the order and decree of this court be sold, and out of the moneys arising from a sale thereof the complainant may be paid for the benefit of the aforesaid lenders thereof, the aforesaid capital sum of seven hundred and fifty thousand dollars, mentioned in and intended to be secured by the complainant's aforesaid indenture of mortgage, and also the said sum of eighteen thousand seven hundred and fifty dollars now due and unpaid for interest on the said capital sum, as aforesaid, and all the interest money hereafter to grow due on the said capital sum, with the difference in the rate of exchange, as aforesaid, together with all the complainant's costs and charges in this behalf sustained, and that the complainant may have such other and further relief in the premises as shall be agreeable to equity and good conscience.

The complainant took a decree *pro confesso*, bearing date the twenty-ninth day of January, eighteen hundred and forty-two, against all the defendants except the said State of Indiana.

On the twelfth day of July, eighteen hundred and forty-two, the State of Indiana filed an answer to the complainant's bill.

The answer admits the existence of a supposed indenture of mortgage, purporting to be made by the Morris Canal and Banking Company to the complainant, as set out in his bill of complaint, but insists, by way of defence, that the said mortgage is usurious and void; that if valid, the complainant, being a mere trustee, cannot maintain a suit thereon in his own name, but must unite with him his *cestui que trusts*. That the complainant's mortgage is a lien only upon that part of the canal between the city of Newark and the river Delaware, and that

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that part of the canal lying between the city of Newark and Jersey City, with the docks, wharves and piers connected therewith, were constructed, and the land purchased, after the date of the complainant's mortgage, and were not included in or covered by the same. That the feeder of the said canal, extending about three miles in length, from Ryerson's pond to the canal at Pompton, was excavated, and the titles to the lands over which the said feeder runs were purchased, after the date of the complainant's mortgage, and that the said mortgage is no lien thereon.

The answer also sets out various mortgages executed by the Morris Canal and Banking Company to the said defendants, upon the canal and its appendages, which it insists are valid liens upon the entire work, and are the first incumbrances upon that part of the canal between Newark and Jersey City, with its wharves, docks and piers, and also upon the Pompton feeder. Admits the several judgments stated in the bill, but insists that the defendants' mortgages are entitled to priority over the said judgments. Denies all fraud, &c.

To this answer the complainant filed his replication in the usual form.

On the eleventh of August, eighteen hundred and forty-two, the complainant entered the usual rule to close testimony. No testimony was taken by either party within the time limited by the said rule.

At October term, eighteen hundred and forty-two, the agent of the State of Indiana presented a petition for leave to file a supplemental answer, in order to set forth certain facts to establish usury in the complainant's mortgage, which were unknown to the defendant at the time of filing the answer; and also for further time to take testimony. The court, after argument, allowed fifty days from the time for the examination of witnesses touching the matters set out in the answer, excepting such parts thereof as relate to the usury therein set forth, but denied the remaining prayer of the petition.

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Depositions having been taken by both parties, the cause came on for final hearing at July term, eighteen hundred and forty-three, upon bill, answer, replication and proofs.

A. *Whitehead, David B. Ogden and Vroom*, for complainant.

B. *Williamson, H. W. Green and I. H. Williamson*, for defendants.

The counsel of the defendants objected to the hearing for want of proper parties to the bill. They insisted;

1. That the *cestui que trusts* of the complainant should have been made parties.

6 *Mad.* 144, 228; *Prec. in Chan.* 275; 1 *Ball and B.* 180; 2 *John. Chan.* 238; 3 *Paige*, 280; 1 *Green's Chan.* 305; 4 *Con. Eng. Chan.* 641; 1 *Ibid.*, 480; 1 *Paige*, 20, 24; 4 *Mad.* 186; *Calvert on Parties*, 184.

2. The receivers of the Morris Canal and Banking Company are necessary parties.

Elmer's Dig. 32; 19 *Vesey*, 615; 1 *Con. Eng. Chan.* 410; *Calvert on Parties*, 110; 18 *Vesey*, 424; 4 *Vesey*, 387; *Mitford's Pleading*, 66; 1 *Mer.* 361; 1 *Vesey and B.* 545; 2 *Brown's C. C.* 276; 2 *Con. Eng. Chan.* 501; 10 *Ibid.*, 75; 12 *Vesey*, 58; 2 *Dickens*, 738; 4 *Mad.* 171; 4 *Con. Eng. Chan.* 327; 6 *Mad.* 170.

3. Samuel Merrill, the president of the State Bank of Indiana, the last mortgagee, is a necessary party.

3 *John. Chan.* 459; *Halst. Dig.* 481; 3 *Vesey*, 314; 2 *Br.* 276; 4 *John. Chan.* 605; 11 *Wheaton*, 604; *Cooper's Eq. Pl.* 33, 34; *Story's Eq. Pl.* 74, 75; *Mitford*, 144.

For the complainant it was insisted—

1. That the *cestui que trusts* are not in all cases essential parties. The court will look at the nature of the contract, at its character, at the number and situation of the parties in in-

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terest. The mortgagee, by the terms of this contract, has entire control of the mortgage. He represents the lenders. It is not the case of an ordinary trust.

2 *John. Chan.* 197, 238; 4 *Paige*, 34; *Cooper's Eq. Pl.* 40; 1 *Brown's C. C.* 101; *Calvert on Parties*, 124; 8 *Brown's P. C.* 146; 4 *Russell*, 372; 1 *John. Chan.* 349, 437; 11 *Vesey*, 429; *Story's Eq. Pl.* 150, 191; 3 *Vesey*, 560; 3 *P. W.* 32; 3 *Vesey*, 76; 1 *Sch. and Lef.* 176; 4 *Mad.* 186.

2. The receivers are not necessary parties. They have no interest, legal or equitable, in the property. They cannot redeem. They may defend in the name of the company. They were appointed after the decree *pro confesso*. The appointment of an assignee *pendente lite*, will not stop or vary a suit in equity: *Story's Eq. Pl.* 150, 281.

The receivers are chargeable with notice, and should apply to be heard if they desire it: 5 *John. Chan.* 89; 1 *Ibid*, 580; *Story's Eq. Pl.* 76.

3. At this stage of the cause, the objection that Samuel Merrill is a necessary party, cannot be sustained. The answer denies that the complainant's mortgage covers the property included in the Merrill mortgage. If so, he is not a necessary party.

The court, after argument, overruled all the objections for want of parties, and directed the cause to proceed. The cause thereupon came on to be heard upon the pleadings and proofs.

For the complainant, it was insisted, that the complainant's mortgage was a lien upon the entire canal, with its appendages. It was so intended by the parties, and the mortgage by its terms, covers the whole work. The company had no power to mortgage a part of the canal; the authority given by the act is to mortgage the canal, with its privileges, appendages, and chartered rights, as one entire thing. The chartered rights cannot be divided; it was never so designed by the legislature, nor can the canal be used advantageously if divided, or any part of it.

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be held without the chartered rights. If the land at the date of the mortgage was not conveyed to the company, the right to acquire it was vested in them by the survey. Having the right to the title, and the authority to mortgage, the incumbrance is valid, though the title to the land was not vested in them. The mortgage is not upon the land, but upon the canal and its appendages.

Upon the same principle, the Pompton feeder, though the title to the property was acquired, and the work constructed after the mortgage, must pass as an appendage of the canal. If not, the whole work in the hands of the mortgagee might be rendered utterly valueless.

The canal company, and those claiming under them, are estopped from setting up, that the mortgage does not cover the entire canal with all its appendages. The mortgage deed in terms, conveys the whole, and they are by it estopped from denying that they had title at the date of the mortgage. *Coke Litt.* 476; 6 *Mod.* 258; 12 *John.* 201; 1 *John. Cas.* 90; 13 *John.* 316; 3 *P. W.* 371; 2 *Mod.* 115.

The mortgages to Indiana are not valid; the debt arose from the canal company trafficking in the Indiana bonds; the charter gives them no authority for that purpose.

These mortgages, moreover, were given not to secure a loan, but a pre-existing debt, and at a time when the company was insolvent; they are therefore void by the statute. *Elmer* 32, sec. 2.

There should be a decree for the sale of the canal, with its appendages and chartered rights—of all the property covered by the mortgage. The act under which the loan was made and the mortgage given, declares that the security shall be by way "of mortgage." This gives to the mortgagee all the rights that any other mortgagee would have. It necessarily involves a power to sell. The mortgage will have all the incidents pertaining to a mortgage at common law. An authority in the court, to direct a sale of the mortgaged premises, by virtue of the mortgage, is necessarily involved.

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For the defendants. The validity of the defendants' mortgages are not impeached by the bill, nor in any way brought into question by the pleadings. No usury is charged, no insolvency of the company. Had these charges been made in the bill, the defendants would have had the benefit of their answer. Of this they cannot be deprived, nor can the complainant go into proof of matters not charged in the pleadings. 9 *Con. Eng. Chan.* 409; 2 *Mad. Chan.* 438; 12 *Vesey*, 477; 3 *Swans.* 471; 2 *Ball and B.* 49; 6 *John.* 543, 559.

The complainant's mortgage does not cover that part of the canal lying between Newark and Jersey City. In terms, it covers only so much as was then laid out, and in the course of completion. The land over which the canal was constructed, between Newark and Jersey City, had not been purchased. The route had been surveyed, but a part of it was subsequently changed, and the laying out was not completed until the survey was filed in the secretary of state's office. They had no title to the land. A title not in *esse* at the time, will not pass by deed. If there be a warranty, it may operate at a conveyance, by way of estoppel.

The Pompton feeder, six miles in length, is not embraced in the mortgage, no reference whatever is made to it. Authority to charge tolls upon that feeder, was conferred upon the company by an act passed on the fifth of March, eighteen hundred and thirty-six, subsequent to the date of the complainant's mortgage.

Nor does the mortgage embrace the wharf or pier at Jersey City. It appears by the minutes of the company, that the pier was not originally contemplated by the company. It is not necessarily a part or an appendage of the canal, but a distinct and independent work.

The acknowledgment of the complainant's mortgage is defective. The New-York commissioner had no authority to take the acknowledgment. The president of the company, who made the acknowledgment, resided at the time in New-Jersey: *Elmer's Dig.* 83, sec. 5; *Ibid*, 89, sec. 1; *Cowper*, 26.

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The mortgage is not duly recorded. The act authorizing the mortgage, requires it to be recorded in the office of the secretary of state; but it did not repeal pre-existing laws, which require all mortgages to be recorded in the counties where the land lies.

The title to land passes by that mortgage, and it should have been recorded in each of the counties through which the canal passes.

The repeal of existing statutes by implication, is not favored. It can only be by necessary implication: 19 *Viner*, 525, pl. 132; 6 *Bac. Ab. "Statute," D.*; 11 *Rep.* 63; *Dyer*, 343—7; 1 *Blac. Com.* 89; 9 *Cowen*, 437; *Dwarris on Stat.* 674.

A registry not authorized, or made upon a defective acknowledgment, is not constructive notice of the existence of a mortgage: 1 *John. Chan.* 300; *Halst. Dig. "Mortgage,"* 260, 1; 1 *John.* 390; 1 *Scho. and Lef.* 157; *Sugden on Ven.* 527; 2 *Binney*, 40.

There was no actual notice. The agent of the defendants denies all knowledge of the execution of a mortgage upon that part of the canal between Newark and Jersey City. The notice must be clear and undoubted, and according to the fact: 2 *Sugden on Ven.* 223, 4.

There is no estoppel. Unless there be a warranty express or implied, the estoppel does not operate. There is here no warranty. The word *give* implies a warranty, but the word *grant* does not: 14 *John.* 193; 7 *Greenleaf*, 96; 5 *Greenleaf*, 227; 4 *Wendell*, 622; 7 *John.* 258; 4 *Cruise's Dig.* 295; 2 *Cain's C. E.* 188; 2 *Binney*, 95; 8 *Paige*, 861; 4 *Cowen*, 599.

The court of chancery has no power to decree a sale of the canal. The act authorizing the mortgage gives no such power. None exists at the common law, independent of the act. At the common law the company might have mortgaged the canal, but no sale could be made under it. The only remedy would be by sequestration. The mortgagee might be put in possession of the rents and profits, or a receiver might be appointed by the court: *Saxton*, 545; 4 *Vesey*, 430, *note a.*; 32 *Eng. Com. Law*, 194; 13 *Serg. and R.* 210.

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THE CHANCELLOR. The original act incorporating the Morris Canal and Banking Company, was passed on the thirty-first of December, eighteen hundred and twenty-four. The object of the incorporation was to construct a canal from the Delaware river at Easton, to the tide waters of the Passaic at Newark. The capital was fixed at one million of dollars, and the other provisions of the act were such as are usual and necessary for carrying out the object. By a subsequent act, passed the twenty-sixth of January, eighteen hundred and twenty-eight, power was given to extend the canal from Newark to the Hudson river. After this work had been progressed in, like most other undertakings of the like character, it was ascertained that the cost would exceed the estimated sum; that it would be necessary to borrow money to complete it. The first act authorizing the borrowing of money, was passed on the twenty-third of February, eighteen hundred and twenty-nine. It authorized the company to borrow five hundred thousand dollars, and to issue therefor their post notes at six per cent, and to secure the same by an assignment, conveyance or transfer of the canal, with its appendages and chartered rights. It is understood this money was borrowed under the act, but has since been repaid, and no question under it has arisen or can arise. It is observable that no further loans were made under this act, but on the twenty-eighth of January, eighteen hundred and thirty, a further act, varying the provisions of the former on this subject, was passed, not limiting the sum, but authorizing the company to borrow such sum as should appear to the board of directors proper and necessary. For securing the amount so borrowed, with interest, the company was authorized to pledge or hypothecate by way of mortgage, trust or otherwise, howsoever, the Morris Canal, with all its privileges, appendages and appertanances, and all the property and chartered rights of the said company. In case of default in payment, authority was given by the said act, for the person or persons making such loan, by due process of law, to acquire and have and hold, use and enjoy the said canal, with its appendages and appertenan-

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ces, and the property of the company, and take and receive the tolls, rents, issues and profits thereof, during the whole residue of the term for which the company was chartered or incorporated, in as full and ample a manner as the stockholders of the company might enjoy the same, subject to the restrictions contained in the charter. It is under this act that the loan was made, on which the controversy in this cause arises. On the twenty-ninth of March, eighteen hundred and thirty, a few months after the passage of the last named act, this company, through the agency of the complainant, effected a loan at Amsterdam, in Holland, of seven hundred and fifty thousand dollars, at five per cent, payable at a distant day, and gave as security, a mortgage upon the canal, its appendages and chartered rights, under and in conformity to the provisions of the act last mentioned. The complainant is a banker, residing at Amsterdam; he was the agent of the company in making the loan, and is declared by the mortgage to be the representative of the lenders also. The money thus loaned, was advanced accordingly, and the interest on the loan, which is made payable half yearly, has been regularly paid to the first day of January, eighteen hundred and forty-one, since which time nothing further has been paid.

The present bill is filed to foreclose this mortgage, and for a sale of the canal. The parties to the bill are, The Morris Canal and Banking Company, the State of Indiana, William C. Noyes, Thomas G. Talmadge, Henry Yates, Abraham Richards and David Selden. The five last named defendants are judgment creditors of the Morris Canal, and as such necessary parties. The State of Indiana is a mortgage creditor, and for a large amount. The bill sets out two mortgages given by the Morris Canal to the State of Indiana; one of the sixth of October, eighteen hundred and forty, on the canal from Newark to Jersey City, to secure the payment of one hundred and ninety thousand dollars, and another of the seventh of October, eighteen hundred and forty, on the entire canal, to secure the payment of nine hundred and sixty thousand dollars. To this bill

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none of the defendants have appeared except the State of Indiana. As to the remaining defendants, a decree pro confesso was signed on the twenty-fifth of January, eighteen hundred and forty-two.

The State of Indiana has filed an answer, and sets up several grounds of objection to the complainant's action. This answer, among other things, discloses two other mortgages, about which nothing is said in the bill, made by the company to Samuel Merrill, president of the State Bank of Indiana, in trust for the State of Indiana, for a large amount, to secure a debt due to the said State, which covers a pier or wharf belonging to the company, at Jersey City. Both of these mortgages bear date the tenth of December, eighteen hundred and thirty-nine, and it is stated by the defendants are for the same debt, and that the last was given only to cover an omission which was made in the drawing of the first.

The cause was brought to a hearing upon the answer filed by the State of Indiana, and upon the depositions and exhibits taken and marked in the cause. The complainant and the State of Indiana are therefore the only parties litigating here; the one representing the loan of seven hundred and fifty thousand dollars, made in the year eighteen hundred and thirty, and the other the mortgages made by the company for very large sums in the year eighteen hundred and forty.

A preliminary objection is taken by the defendants to this cause being heard, for the want of parties, which objection must first be considered.

And first, it is insisted that the complainant, being a trustee or agent only of the lenders, the lenders themselves, who are the *cestui que trusts*, are necessary parties. The undeniable general rule in equity is, that a nominal trustee cannot bring a suit in his own name alone, but must associate with it the names of the persons having the beneficial interest. The cases cited on the argument fully establish this proposition, and it will be seen by the case of *Stillwell v. McNeely*, 1 *Green's Chan.* 305, that the rule is recognized in this court; but it is there

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stated that the court will hold, as they certainly must, a discretionary power to dispense with that necessity, in cases of great inconvenience, or where unnecessary expense would be incurred. In *Van Vechten and Sebring v. Terry and others*, 2 John. Chan. 197, on a bill for foreclosure, a nominal trustee was held to be a sufficient party defendant, because the real owners were two hundred and fifty. This was to avoid expense.

There are two reasons why I deem it unnecessary that any other persons should be made complainants. The first is, the great inconvenience to which it would subject these parties. The character of this transaction is from its very nature, and the common course of business, well understood. The complainant, being a banker of extensive money transactions, makes this loan for the company, by opening books at Amsterdam, by which all that choose may come in and subscribe such sums as they think proper, according to the published terms. This is the common course of business, and there is no doubt from the papers that this was the course pursued here. The complainant does not appear to have lent the money himself, but to have been the negociator and trustee. These subscriptions may be more or less, but from the large sum loaned is likely to embrace a great number of persons. These persons, scattered over the world, it would be almost impossible for the complainant to find out. The true additional parties, if any, would be the owners of the stock at the time of filing the bill, and if dead, their representatives must be substituted.

To require the complainant to take such a course, would be almost a denial of the aid of the court in the recovery of his money. I think it may well be classed among those cases which are excepted out of the general rule, from the great inconvenience which its enforcement would bring upon the parties. Nor does the answer made by the defendants' counsel to this view of the case, that this state of facts are not shown in the bill, sufficiently meet it. The character of the transaction is there stated. It appears in the correspondence between the

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parties. It is in fact shown on the face of the mortgage itself, and the court should not shut its eyes against the knowledge we all possess of the common course of events, and particularly of the course of business among men. Upon the case, as stated in the bill, every man acquainted with the manner of transacting business of this kind, will perceive, that here was a stock opened, and that all who chose came in and subscribed.

The second reason against sustaining this objection, arises from the face of the mortgage itself. It is not improbable that the intelligent gentleman at the head of the Morris Canal Company at the time of the giving of this mortgage, (Mr. Colden,) and who was also an able lawyer, might have anticipated the embarrassment that would grow out of having any thing to do in this business with the lenders of the money, and it is therefore particularly agreed, that the complainant shall represent the lenders. The company dealt only with the complainant. He is called "the agent and trustee of the several subscribers to the loan," and throughout the writing is spoken of as Wilhem Willink, junior, "representing the said lenders." It was, therefore, a part of the original contract, that these lenders should in this transaction be represented by the complainant, and by him alone. To oblige him now, in seeking to recover this money again, in the face of this agreement, to come before the court in the names of all the lenders, would appear to me not only unnecessary, but unjust.

It was, in the next place, insisted by the defendants, that the receivers of the Morris Canal are necessary parties.

After the decree *pro confesso* was taken against the Morris Canal and Banking Company, it appears from the evidence in the cause, receivers were appointed for that company, under the act, entitled, "An act to prevent frauds by incorporated companies." A number of authorities were cited on the argument, clearly showing, that in bankruptcy cases the assignee is a necessary party; and the same rule obtains in the discharge of insolvent debtors. In these cases, however, the property of the bankrupt or insolvent passes to the assignee and vests in him.



The title is in the assignee, and he must be brought before the court. The provisions of the statute under which these receivers are appointed, are peculiar. *Elmer's Dig.* 32. The property of the company does not vest in the receivers, nor does the appointment of receivers necessarily put an end to the corporation. The receivers have the sole power over the corporation; they are substituted in the place of the directors and managers, but for the purpose of settling up and closing the affairs of the company. The title to the property is not changed, but a power only is delegated to the receivers to take charge of it and sell it. These receivers, too, may bring suits in their own name, and for aught I see, in the name of the corporation, should they prefer it; and if so, they may defend a suit in the name of the corporation. As a decree *pro confesso* in this cause was taken against this company before the receivers were appointed, by which the right of the complainant to recover is ascertained, and the amount only remains to be settled; and more especially, as the corporation is not put an end to by this act of the court, and the receivers may appear and controvert the amount, in the name of the corporation, I see no good reason why the proceedings in this cause should be delayed to bring them before the court.

It must be remembered too, that this application comes from the State of Indiana; the receivers do not apply or desire to be made parties. If the receivers were asking permission to be substituted as defendants with a view of setting up a defence, I should not hesitate to admit them in any stage of the proceedings, and if a decree had not been entered before their appointment, it would be a safe course to require it to be done. In the absence, however, of any such application on the part of the receivers, and with a decree entered against the company before their appointment, it is in my opinion unnecessary that they should be brought into court at the instance of a third party.

The third defect alleged by the defendant, is the omission as a party, of Samuel Merrill, president of the State Bank of Indiana, the trustee of the State of Indiana. The mortgages made

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to Merrill are not on the canal, but on a pier or wharf at Jersey City, which, according to the answer, are in no wise affected by the complainant's mortgage. This objection, therefore, cannot be sustained, at all events in this stage of the cause, for if the complainant's mortgage does not cover that pier, then certainly Merrill would be an improper party.

The objections, therefore, for want of parties, are overruled; which leads to the consideration of the cause on its merits.

The first and the great question is, does the complainant's mortgage cover the canal from Newark to Jersey City? This part of the canal was surveyed, (from the evidence of Robert Gilchrist, who was for many years cashier of the company, and probably has as much knowledge of its affairs at that time as any person,) but not excavated, nor were the lands purchased until after the mortgage to the complainant was given. The survey, although made prior to giving the complainant's mortgage, was subsequently varied. Charles T. Shipman also says the route was surveyed before the mortgage. Did the mortgage, then, cover this part of the route? The act authorizing the extension of the canal to Jersey City, was passed before the date of complainant's mortgage, and the extension was built under the same regulations with the other parts of the canal. It became, in fact, part and parcel of the entire canal. It is declared in the act itself, that for the purpose of making this continuation or extension, the company shall have all the rights, powers and privileges granted by the original act, and be subject to all the restrictions, limitations, conditions and provisions in that act contained, in the same manner and to the same effect as if the company had been originally authorized by the said act "to construct a canal or artificial navigation to connect the waters of the Delaware river near Easton, with the waters of the Hudson at or near the city of Jersey. It was designed to make it the same as if the original charter had been to construct the canal to the Hudson instead of the Passaic. After this extension act, the Morris Canal became, in fact, a canal from the Delaware to the Hudson, and whenever spoken of after that

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time, must be so considered. The acts authorizing the borrowing of money, were not passed until after the act authorizing the extension, and therefore when the Morris Canal is thus spoken of, it can, upon no fair construction, mean any thing short of the entire canal to the Hudson. After this act, the canal to the summit, to Morristown, or to any other intermediate point, might with the same propriety be termed the Morris Canal, as that part between the Delaware and the Passaic. The act clearly contemplated a mortgage on the entire canal, with its appendages and chartered rights. We must then see what was actually covered by the terms of the mortgage. The language used in the granting part is "all and singular the Morris Canal, so called, being the canal authorized by the laws of the said state of New-Jersey, as the said canal has been laid out through the several counties of Warren, Sussex, Morris, Essex and Bergen, in the said state, and is now in a course of completion, from the Delaware to the Hudson river." Can any language be plainer? It was the clear intention of the parties to mortgage the entire canal from the Delaware to the Hudson, and it can mean nothing else. If any doubt remained on this question, the correspondence between the complainant and the president of the company at the time would conclusively settle it.

The land through which the canal runs was not conveyed to the company at the time this mortgage was given, and therefore it is earnestly insisted that it cannot pass by it. There does indeed appear some inconsistency at first view, that it should pass, and yet can it be possible, that if on the line of the route at any place, it should turn out that a deed was obtained for a piece of land since the execution of the mortgage, that such part of the canal is not embraced within it? This would put an end to all advantage to be derived from the canal; a purchaser must have the entire property or it can be of no use. I am satisfied, that it is immaterial whether the title passed to the company before or after the date of the mortgage. The law had been passed authorizing the extension to Jersey City,

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and the route had been surveyed, although that route was afterwards changed. The entire canal was, and was so stated in the mortgage to be, only in a course of completion, and in that condition the mortgage was authorized by law. By the charter of the company, this mode of obtaining title, by purchasing the fee of the lands, is not contemplated, but a mode is pointed out, by which, after an assessment by commissioners, the company acquire a right, not to the land, but to the use of it so long as it is used for a canal. The feeder too, must pass in the same way, for the canal could be of no service to a mortgagee without water, and this feeder was built as part and parcel of the canal, and is an appendage to it. The wharf or pier at Jersey City, if, as I suppose, it was constructed as an appendage to the canal, must pass upon the same principle. The language of the mortgage is very comprehensive. The language is, "together with all and singular the dams, aqueducts, locks, planes, culverts, bridges, towing-paths, embankments, basins, wharves, docks, waters, water-courses, machinery, privileges, appendages and appertenances thereto belonging or appertaining," evidently meaning to embrace the entire canal and every thing connected with it.

I deem it unnecessary to examine whether the mortgage was acknowledged or recorded according to law. That can only be important on the question of notice, and from the evidence, the State of Indiana had sufficient notice in fact and independent of the record. Milton Stapp, who was the fund commissioner of the State of Indiana at the time the mortgages were given to that State, and who negotiated much of the business between that State and the Morris Canal Company, upon his own examination, admits he was well acquainted at that time with the debt of seven hundred and fifty thousand dollars to the complainant, and that there was a mortgage from Easton to Newark to secure it. But he says he did not examine the record, to ascertain its contents, although it was in the office of the secretary of state at Trenton, where it was recorded, but he relied on the statement made to him by the president. This was notice

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enough, and if the agent did not think it worth while to look at the instrument for himself, he cannot complain, nor those he represents, if they should be mistaken in its character or purport. With the information given to this agent, the defendant cannot set up, with any fair pretence, a want of notice of the complainant's mortgage. The truth is, the existence of this mortgage was notorious, and it has received the common appellation of the Dutch mortgage.

Again, the defendants insist that no decree for sale can be entered in this case, and that the only redress for the complainant is, by sequestration of the tolls and rents and profits. Upon a common law mortgage, given by the company, this may possibly be true, but this is a statute mortgage, deriving its construction from statute alone. It goes beyond a common law mortgage in transferring the chartered rights. A mortgage of this character is a novelty with us, and as was to be expected, brings with it much discussion and discrepancy of opinion on its true construction. The act authorizes the company to mortgage the entire canal, with its appendages and appertenances, and I cannot presume that the legislature designed anything else than to invest the mortgagee with all the power and authority incident to an instrument of that kind. Nor do I see that a contrary construction could be of any advantage to the defendants, while it certainly would greatly prejudice the complainant.

If, however, I should mistake the rights of the complainant under this mortgage, upon a sale the purchaser will acquire nothing beyond what he is entitled to by the terms of the instrument, which will always be an open question for any tribunal before whom the trial of the right to the property may come.

So far as the complainant has attempted to impeach the defendants' mortgages, I do not enter into it, because they are in no way called in question by the pleadings. There is no doubt the State of Indiana has a large and meritorious demand against this Company, and which I should be very glad to see paid.

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There is no justice, however, in their being paid at the expense of the complainant. His mortgage is of long standing, was fully known to all the parties, and should constitute the first lien on the property. After that is paid, the claim of the State of Indiana is the next in order.

If the complainant's mortgage covers the property contained in that to Samuel Merrill, as it appears to me it does, then he should have been made a party. But inasmuch as it involves a very small part of the property, (a dock or pier,) and he was a mere trustee for the State of Indiana, which State is the party defendant here, and more especially as Merrill not being made a party, his right to redeem will not be barred by any decree which may be entered, I deem it unnecessary to delay the complainant by bringing him before the court.

The complainant, therefore, is, in my opinion, entitled to a decree for a sale of the entire canal, with the feeders, docks and appendages belonging to it, and in case it shall bring more than sufficient to satisfy his demand, then the State of Indiana and the other parties holding subsequent liens, should be paid in the order of their priority.

There must be a reference to a master in the usual form.

The interlocutory order was as follows :

" This cause coming on to be heard at a court of chancery, held at Trenton, in the state of New-Jersey, in the term of July, in the year of our Lord one thousand eight hundred and forty-three, in the presence of Asa Whitehead, solicitor, and of counsel with the complainant, and of Benjamin Williamson, solicitor, and of counsel with the State of Indiana, one of the said defendants; the complainant's bill having heretofore been ordered to be taken as confessed against the Morris Canal and Banking Company, William C. Noyes, Thomas G. Talmadge, Henry Yates, Abraham Richards and David Selden, the other defendants; and the bill of complaint of the said complainant, and the answer of the State of Indiana to the same, and the

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evidence, proof and exhibits in the said cause having been read and heard, and the arguments of counsel on both sides having been heard, and time taken to advise thereon : And thereupon the chancellor is of opinion, and doth hereby declare, that the act of the legislature of the state of New-Jersey which authorized the giving of the complainant's mortgage, clearly contemplated and intended a mortgage on the entire canal with all its appendages and chartered rights, and that it was the intent of the parties to include in said mortgage the entire canal from the Delaware to the Hudson river, and that the said mortgage in its terms and provisions embraces the whole of the said canal to the Hudson river, and every thing connected with it, including the part then in a course of completion and not finished, together with the feeder which was built as part and parcel of the said canal and is an appendage to it, and the wharf or pier at Jersey City which was also constructed as an appendage to the said canal : And the chancellor being further of opinion, doth declare, that the State of Indiana, at the time of the execution of the said bonds and mortgages of the said Morris Canal and Banking Company to the said State of Indiana, had due notice of the existence, nature and extent of the mortgage of the said complainant ; and that, under the above recited act of the legislature, the complainant is entitled to have the amount due on his said mortgage raised by sale of the whole of the said mortgaged premises, including the chartered rights and privileges of the said Morris Canal and Banking Company, according to the prayer of his bill ; and that his said mortgage is a first lien, and first to be satisfied out of the said premises, and that the balance, if any, be appropriated to the payment of the mortgages of the said State of Indiana : Whereupon it is now, on this fourteenth day of October, in the year of our Lord one thousand eight hundred and forty-three, by his excellency William Pennington, governor and chancellor of the state of New-Jersey, ordered, that it be referred to Theodore Frelinghuysen, junior, one of the masters of this court, to ascertain and report the

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amount due to the said complainant, upon the mortgage held by him upon the premises mentioned and described in the said bill of complaint; and also the amount due, if any thing, to the said State of Indiana, upon her several mortgages—and to report accordingly; and that he make his report with all convenient speed.”

CASES

ADJUDGED IN

THE PREROGATIVE COURT

OF THE STATE OF NEW-JERSEY,

APRIL TERM, 1843.

In the matter of ABRAHAM COURSEN'S WILL.*

By the commission and explanatory instructions to lord Cornbury, all the ecclesiastical jurisdiction of the province of New-Jersey relating to "the collating to benefices, granting licenses for marriages, and probate of wills," was reserved to the governor. He was not only ordinary, but metropolitan of the province. He had no superior but the queen in council, and no subordinates. His jurisdiction over these subjects was sole and exclusive.

This constitution of the court continued till the revolution, and was adopted by the convention which framed the constitution of the state in seventeen hundred and seventy-six.

For one hundred and forty years, the governor or ordinary has been the only judge of probate known to the constitution of New-Jersey.

The surrogates appointed by the governor were mere deputies, subject to the control and supervision of the ordinary, and to be removed at his pleasure.

By the appointment of surrogates, the ordinary did not in the least curtail his own jurisdiction. Whilst he held appellate jurisdiction over their acts, his own original jurisdiction remained entire.

The surrogates did not hold to the ordinary the relation which the English ordinaries hold to their metropolitan. The ordinary retained jurisdiction of all cases. The surrogate, acting as his deputy, had also jurisdiction of

* The reporter is indebted to J. P. Bradley, esquire, for the report of this important decision.

[In the matter of Abraham Courseen's Will.]

all cases submitted to him, unless some special restriction were inserted in his commission.

a doctrine of *bona notabilia* had never any place in this state.

e surrogate and the orphans' court, in matters of probate and administration, were left, by the act of seventeen hundred and eighty-four, which established the orphans' court, to occupy the same relation to the ordinary, which previous to that statute the surrogate alone had occupied.

e act of eighteen hundred and twenty is similar in this respect to the act of seventeen hundred and eighty-four.

e fact that the appointment of his surrogates has been taken from the ordinary and conferred upon the joint-meeting, does not in the least alter their relative jurisdictions or powers.

e surrogates are still, in the language of the act of eighteen hundred and twenty, the ordinary's surrogates, and in effect his deputies.

e ordinary has the same original and appellate powers now that he ever had.

e original jurisdiction of the ordinary over the probate of wills and the granting of letters of administration, is general and full, and not limited and special.

e acts of seventeen hundred and eighty-four and eighteen hundred and twenty, are merely declaratory, so far as they attempt to specify the subjects of the jurisdiction of the ordinary or of his surrogates.

e ordinary has, by virtue of his general powers, undoubted jurisdiction in the matter of the probate of a will, where the testator, at the time of his death, resided in a foreign state, and where the will has been proved there.

e jurisdiction of the ordinary in such cases is complete, without the aid of any statute, at least where the original will is produced.

whether he may, under such circumstances, grant letters testamentary upon the production of an exemplified copy of the will, is perhaps doubtful.

whether, since the acts of seventeen hundred and eighty-four and eighteen hundred and twenty have limited the surrogate's jurisdiction to his own county, he may grant probate of a foreign will independent of the statute, seems doubtful.

e jurisdiction of the ordinary is not taken away or impaired by the act of eighteen hundred and twenty-eight, which authorizes surrogates to grant letters testamentary upon an exemplified copy of a foreign will proved in another state. The ordinary may proceed independent of the statute, nor is he bound by the terms or the equity of that statute to exact security of foreign executors.

one executor of a foreign will proved in another state, has applied for pro-

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bate under the statute, another executor may produce and prove the original will independent of the statute.

Nor is it necessary that the executor who produces the original will should prove it before the same surrogate who granted letters testamentary to his co-executor.

He may prove it before the ordinary, or perhaps before another surrogate. The applications are distinct and independent.

When, however, the executors have all taken out letters, they are co-executors of the will, and must sue and be sued jointly, in the same manner as if they had all proved the will at the same time and before the same officer.

The jurisdiction of the ordinary is concurrent with that of his surrogates, and whenever a surrogate has obtained cognizance of a particular case, the ordinary cannot interfere *pendente lite*.

He may review the surrogate's proceeding by appeal, but in no other way.

A certified copy of the surrogate's proceedings on an application for probate, has the effect of a record, against which no averment will be admitted by the ordinary.

If it appear by the certified copy of the surrogate's proceedings that probate was granted by him on the application of both of the executors, one of the executors will not be permitted to prove, by way of destroying the effect of that record as evidence against him before the ordinary, that his name was used in the application to the surrogate without his consent.

A caveat is incident to all ecclesiastical courts, and prevents the case from being proceeded in without the caveator being heard.

It is a general rule, that all persons who may be injured by admitting a will or codicil to probate, may caveat against it.

GERSHOM H. Coursen, of New-York, one of the executors of the last will and testament of Abraham Coursen, deceased, took an order at the term of April, eighteen hundred and forty-three, to show cause on the first of May, why the original will and codicil should not be admitted to probate. The testator resided and died in the city of New-York. By his will, Ephraim Marsh and another were appointed executors; by the codicil, G. H. Coursen was substituted as co-executor with Marsh. Coursen proved the will and codicil in New-York.

Afterwards, on the twenty-ninth of March last, application on behalf of both executors, was made to the surrogate of Morris,

[In the matter of Abraham Coursen's Will.]

for probate in this state by exemplified copy, under the act of March sixth, eighteen hundred and twenty-eight. The usual order being granted and published, the surrogate, on the first day of May, granted letters testamentary to Marsh. A certified copy of his proceedings was produced on this hearing. Coursen denied that he had authorized his name to be used in that application. By proceeding under the statute, he would be obliged to give security, being a non-resident executor. Marsh opposed Coursen's present application before the ordinary. The cause came on for hearing upon the rule to show cause before the ordinary, at Newark, on the first day of May.

A. Whitehead and *O. S. Hulsted*, for Marsh, contended, first, that the ordinary had no jurisdiction of the case. His jurisdiction since the act of eighteen hundred and twenty, is special and limited, reaching only to cases where a "convenience" would be subserved by his exercising it: *Elm. Dig.* 362, 363, secs. 21, 27. And cases like the present are specially provided for by the act of eighteen hundred and twenty-eight, which expressly gives the surrogates jurisdiction of the probate of foreign wills, proved in another state. That act must be construed as exclusive and compulsory: *Elm. Dig.* 601.

Secondly. But admitting that the ordinary has jurisdiction, his jurisdiction is only concurrent with that of the surrogates, and the surrogate of Morris having first taken cognizance of the case, his cognizance is now exclusive.

F. T. Frclinghuysen and *A. C. M. Pennington*, contra, contended, first, that the ordinary has complete jurisdiction, *ex officio*; that originally the surrogates were only his deputies, and the same relation still subsists between them: *Elm. Dig.* 444; 4 *Griffith L. Reg.* 1185; *Toller's Ex.* 50.

That the surrogate's, and not the ordinary's jurisdiction, is special and limited: 4 *Griffith*, 1238, n; *Elm. Dig.* 444, pl. 4.

That the act of eighteen hundred and twenty-eight is

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merely affirmative, giving surrogates a new power, and providing a remedy where the original will cannot be produced.

Secondly. Admitting the surrogate's certificate to be true, he had no jurisdiction, and his proceedings are void. It was not a copy of the will, but of the record of the will, which was produced before him; and letters were granted to one only of the executors, whereas the statute requires all to concur.

Thirdly. They offered to impeach the certificate of the surrogate, as obtained on a fraudulent suggestion of facts, by proof that Coursen never authorized the application to be made, and that he protested to the surrogate against proceeding. The ordinary declined to receive the proofs offered.

THE ORDINARY. I have no difficulty in deciding this case at once; but as the parties may be saved future expense by a decision of the several points which have been raised before me on the argument, I will take them up in order.

Nothing is more embarrassing in our whole municipal system than this subject of the powers of the ordinary, the surrogate and the orphans' court. The course and practice of ecclesiastical courts in general, are so little familiar to our bar, and our statute laws are often so vague and uncertain, that the whole subject presents a wilderness of perplexity to the practitioner. A reference to the history of the courts exercising ecclesiastical jurisdiction in New-Jersey, may serve to throw some light on this subject.

After the surrender of the powers of government by the proprietors of the province to queen Anne, in seventeen hundred and two, the specific form of its constitution depended, until the adoption of our present constitution in seventeen hundred and seventy-six, upon the commissions and instructions given to the several governors who were appointed by the crown. These instructions were little varied during the whole period. In reference to the constitution of the office and duties of the ordinary, they were never varied at all.

By the commission and explanatory instructions given to

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lord Cornbury, the first royal governor, all the ecclesiastical jurisdiction of the province relating to "the collating to benefices, granting licenses for marriages and probate of wills," was reserved to the governor : *Leaming and Spicer*, 639. He was not only ordinary, but metropolitan of the province. He had no superior but the queen in council. His court was called the "prerogative court," an appellation applied in England to the archbishop's court. Nor had he any subordinates ; his jurisdiction over these subjects was sole and exclusive. This constitution of the court continued till the revolution, and was adopted by the convention which framed the present constitution of the state in seventeen hundred and seventy-six. For one hundred and forty years the governor or ordinary has been the only judge of probate known to the constitution of New-Jersey.

But at an early day the provincial governors, for their own and the people's convenience, appointed deputies, with the name of surrogates, residing in different parts of the province, to act in their stead, upon such cases as the people chose to submit to them. Sometimes there were more of these deputies, sometimes less ; sometimes more than one in a county, sometimes only one for two or three counties. They were mere deputies, subject to the control and supervision of the ordinary, and to be removed at his pleasure. By appointing them the ordinary did not in the least curtail his own jurisdiction. Whilst he held appellate jurisdiction of their acts, his own original jurisdiction remained entire.

These surrogates did not hold to the ordinary the relation which the English ordinaries hold to their metropolitan. The English ordinary has exclusive jurisdiction where the goods of the deceased are all situated in his diocese ; and the metropolitan has exclusive jurisdiction where notable goods are situated in two or more dioceses. No relation of this kind subsisted between the ordinary and surrogates of New-Jersey. The ordinary retained jurisdiction of all cases. The surrogate, acting as his deputy, had also jurisdiction of all cases submitted to

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less some special restriction were inserted in his commission. New-Jersey was never subdivided into dioceses. The use of *bona notabilia* had never any place here.

The power of the ordinary to appoint these officers, seems to have been questioned. Their acts were recognized as valid by the courts, and they came to be considered as lawful competent judges of the matters submitted to their cognizance. And although they are unknown to the constitution, they have been frequently recognized by acts of the legislature. No legislature has ever attempted materially to alter the relation between the ordinary and his surrogates.

The first act which appears on our statute book, in relation to the courts of probate, is that of December, seventeen hundred and eighty-four, by which it was directed, "that the ordinary should thereafter appoint but one deputy or surrogate in each county, and that the power and authority of the surrogate should be limited to the county for which he should be appointed." This act also established a new county court, called the orphans' court, composed of at least three judges of the common pleas, which, besides considerable equitable jurisdiction, was invested with certain of the powers previously exercised by the surrogate, such as hearing and deciding disputes about the validity of wills and rights of administration: which, when they arose before the surrogate, he was directed to hand over to the court. Thus the orphans' court shared a portion of the surrogate's previous jurisdiction, and so far stood in his shoes, an appeal lying to the ordinary from its decisions in the same manner as from those of the surrogate's. Both the surrogate and the orphans' court, in matters of probate and administration, were left to occupy the same relation to the ordinary, which, previous to the statute, the surrogate alone had occupied. The present law, which was passed in eighteen hundred and twenty, is similar in this respect to that of seventeen hundred and eighty-four.

The fact, that in eighteen hundred and twenty-two, the appointment of his surrogates was taken from the ordinary and

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conferred upon the joint meeting, (*Harr. Com.* 32,) does not, in the least, alter their relative jurisdictions or powers. The surrogates are still, in the language of the act of eighteen hundred and twenty, the ordinary's surrogates, and, in effect, his "deputies."

From this short sketch of the history of these jurisdictions, it sufficiently appears that the ordinary has the same original and appellate powers, now, that he ever had. He has never been deprived of these powers by any act of the legislature, in fact; leaving out of view the question, whether an act of that kind would be constitutional if passed at all. The acts of seventeen hundred and eighty-four and eighteen hundred and twenty, are merely declaratory, so far as they attempt to specify the subjects of the ordinary's jurisdiction, or that of his surrogates. I have, therefore, no doubt at all that the ordinary's original jurisdiction over the probate of wills, and the granting of letters of administration, is general and full, and not limited and special.

Neither have I the least doubt as to the ordinary's jurisdiction over a case like the present, where the testator resided, at the time of his death, in a foreign state, and where the will has already been proved there. The ordinary has cognizance of this class of cases, by virtue of his general powers. It is a power which is frequently exercised by the ecclesiastical courts of England: 1 *Williams's Exec.* 172, 204; 1 *Hugg. Rep.* 625. And the jurisdiction of the ordinary is complete without the aid of statute on the subject—at least where the original will is produced. Whether he may grant letters testamentary upon an exemplified copy, is, perhaps, doubtful. It is the opinion of intelligent counsel that under the act of seventeen hundred and thirteen and fourteen, he may. *Elm. Dig.* 595, *pl.* 3; 4 *Griffith, L. R.* 1241, *n.*

Whether, since the acts of seventeen hundred and eighty-four and eighteen hundred and twenty have limited the surrogate's jurisdiction to his own county, he may grant probate of a foreign will without recourse to the statutes, has been questioned by

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some. The precise meaning of that limitation has not been defined. But I believe it is generally conceded by the bar that the surrogate's jurisdiction does extend to such a case. I have known instances of its being exercised under the advice of careful and eminent counsel. The limitation of the surrogate's power by county lines, may have relation simply to the territory within which he may perform any act as surrogate. The surrogate of Morris or Cape May, for example, may not go into the county of Middlesex and transact the local business of that county, which would naturally come before the surrogate of Middlesex. Or it may go further, and debar the surrogate of one county cognizance of probate or administration where the deceased resided, at the time of his death, in another county, the surrogate of which may be deemed to have a preferable right to take jurisdiction of the case. This is the construction given by Mr. Griffith, 4 *Law Reg.* 1238, *n.* But neither of these constructions of the limitation created by the statute, would prevent any surrogate from proving the will of a non-resident of the state, where one surrogate cannot set up any better claim to cognizance of the case than another: 4 *Griffith's L. Reg.* 1241, *n.* But however this may be, there is no question but that the ordinary has complete jurisdiction.

This jurisdiction of the ordinary is not taken away or impaired by the act of eighteen hundred and twenty-eight, which authorizes any surrogate to grant letters testamentary upon an exemplified copy of a foreign will proved in another state. That act is merely affirmative. It does not, in the least, interfere with the general *ex officio* powers of the ordinary, or the manner of exercising them. At all events, where the original will is produced and proved before him, he needs recourse to no statutory authority to proceed; no statute has restrained his general authority. Nor is he bound by the terms or the equity of that statute to exact security of foreign executors. Since the passage of the law of eighteen hundred and twenty-eight, I have known repeated cases, conducted under the advice of astute counsel, where original foreign wills have been proved in the usual man-

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ner, both before the ordinary and surrogate, without reference to the statute : and no security has ever, to my knowledge, in any such case, been exacted of foreign executors. Where, however, it is necessary, or the executors choose to proceed under the statute, of course they are bound by its terms, and must give bond as is thereby required.

But suppose, in the case of a foreign will, proved in another state, one executor has applied under the statute, may not another executor produce and prove the original will, irrespective of the statute ? I have no doubt he may. The statute is not compulsory where the original will can be produced. There is no reason why a foreign executor, for example, should be compelled to proceed under the statute, because his co-executor may have done so, and thus be bound to give security contrary to the general policy of the law. He is invested by his testator with a personal trust and confidence. He accepted a burden at the hands of his deceased friend ; and it is against all sound reason that he should be fettered and bound by restrictions which that friend never intended to impose ; or that the latter should be deprived, by an arbitrary rule of law, of the services of one to whom he wished to commit the care of his estate after his death.

Nor is it necessary that the executor who produces the original will, should prove it before the same surrogate who has already granted letters testamentary to his co-executor. He may, without doubt, prove it before the ordinary, or perhaps before another surrogate. The applications are distinct and independent. When, however, the executors have all taken out letters, they are co-executors of the will, and must sue and be sued jointly, in the same manner as if they had all proved the will at the same time, and before the same officer.

With reference, therefore, to those points of objection made to this application, which I have thus far considered, I should have no hesitation in allowing probate of this will and codicil by the applicant.

But there is one difficulty in this case, which cannot be sur-

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anted. Notwithstanding the complete original jurisdiction which the ordinary has in all cases of probate and administration, his jurisdiction is concurrent with that of his surrogates. These officers have long been recognized by the laws, and although they at first derived their powers from the ordinary, as his deputies, those powers have been confirmed to them by long usage and successive declaratory acts of the legislature; and the ordinary cannot now resume them at will, nor supersede their proceedings under and by virtue of those powers. And it follows as a necessary consequence, that whenever a surrogate has obtained cognizance of a particular case, the ordinary cannot interfere *pendente lite*. He may review the surrogate's proceedings by appeal, but in no other way. The concurrent jurisdiction of the surrogates is extended by the act of eighteen hundred and twenty-eight, to cases of the kind now under consideration, even if they did not have it before.

The question then arises, had the surrogate of Morris taken cognizance of this case when application was made to the ordinary? Most assuredly he had. If Marsh had alone applied to the surrogate of Morris for letters testamentary under the statute, the ordinary could still have taken cognizance of Coursen's application. But it appears by the certified copy of the surrogate's proceedings, that both these executors applied to him; and until that application, and the cognizance of the surrogate arising thereupon, were exhausted, I could not interfere. And it appears that Coursen's application to this court was made pending the proceedings in Morris. I cannot, therefore, take cognizance of the case. It would be a pernicious example to be set by the ordinary. I must refuse the probate of this will and codicil on the application now before me. If a subsequent application should be made, free from this objection, after the surrogate's cognizance is spent, I shall have no hesitation in granting it.

In making this decision, of course, I receive the certified copy of the surrogate's proceedings as a verity. I am bound to respect his attestation under his official seal. In this court it

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has the effect of a record, against which I cannot admit counter-averments. The proof which has been offered to impeach it, I cannot receive. Any error or irregularity in the proceedings of the surrogate, can come before me only by appeal.

The decision of this case cannot, in the least, be affected by any aspect of the contest between these executors, on which it is not proper for me now to remark; nor is it affected by the fact that Marsh cannot take out letters in New-York without giving security. I am to decide by the law of New-Jersey, without reference to the laws of New-York. The latter might have to be consulted in determining the validity of the will, but not in determining the mode of granting probate. Nor is the question affected by the amount, the situation, or the nature of the estate. Be it large or small, real or personal, in New-York or in New-Jersey, the law regulating the manner of probate here, must be the same.

As to the question whether Marsh might put in a *caveat* before me, against proving the codicil, I am inclined to think he might. A *caveat* is incident to all ecclesiastical courts, and prevents the case from being proceeded in without the *caveator* being heard. It is a general rule that all persons who might be injured by admitting a will or codicil to probate, may *caveat* against it. In this case, Marsh was appointed an executor by the original will; the codicil substitutes a new co-executor to act with him. There may be strong reasons why this substitution should operate injuriously to him. But as it is not necessary to decide this point, I shall express no positive opinion upon it.

The application is refused.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY.

JANUARY TERM, 1844.

DANIEL HAINES, ESQ., CHANCELLOR.

ROELIFF T. WYCKOFF and JOHN W. VANDYKE v. THOMAS COCHRAN. 49

It is no objection to the dissolution of an injunction, that exceptions have been filed to the defendant's answer. The rule of the English court of chancery upon this subject does not prevail in New-Jersey.

The court will hear the argument upon the exceptions to the answer, and ~~on~~ upon the motion to dissolve the injunction, at the same time.

BILL for an injunction to restrain proceedings at law filed, and an injunction issued, on the twelfth of December, eighteen hundred and forty-three. The defendant filed his answer on the third of January, eighteen hundred and forty-four, and gave notice of a motion to dissolve the injunction at the ensuing January term. On the eighteenth day of January the complainants filed exceptions to the defendant's answer, for insufficiency. The complainants' counsel resisted the hearing of the motion to dissolve, upon the ground that exceptions to the answer were pending undisposed of. The court directed the argu-

[Wyckoff et al. v. Cochran.]

to proceed, and the exceptions to the answer to be argued same time.

1. *Miller and Vroom*, for complainants.

2. *Grover and A. Whitehead*, for defendant.

THE CHANCELLOR. The complainants' counsel objected to the coming of this case coming on, and for cause, showed that the exceptions to the defendant's answer for insufficiency had been made and not yet disposed of; and they referred to the English chancery practice, and the practice of New-York, to sustain the objection.

I have determined that the cause should proceed, and that I would grant the motion to dissolve the injunction and the exceptions at the same time, and I take the occasion to express here, fully, my reasons for the course pursued.

In the English practice in the court of chancery, where the answer is filed in term, exceptions must be filed in the same term within eight days afterwards; if the answer is filed in vacation, then within eight days after the beginning of the following term; and the complainant is compelled to procure the report upon them, within a reasonable time, stated in the writ, sometimes to be a week, but generally four days. In the exchequer, the exceptions must be put in within four days within the term next after the coming in of the answer.

In our court they are not made the subject of reference, but the court determine them upon argument, in the first instance: see *1st Injunction*, 127, 8, 130, (73 in ed. of 1822); 1 *Harr.* 197; *Ibid*, 547; *Wyatt's Pr. Reg.* 241.

In the courts of New-York, where an injunction has issued against a plaintiff excepts to the answer, he must procure the report in fourteen days, or show cause why he has not, or the exceptions filed will not prevent the dissolution of the injunction: *Blake's Chan. Prac.* 285; *Rule 57 of the Court of Chan.*

[Wyckoff et al. v. Cochran.]

In New-Jersey we have no such rule, requiring the party excepting to have the exceptions disposed of without delay; and if the practice referred to should be adopted here, great delay and vexation might result.

By the twenty-second section of the act respecting the court of chancery, (*Elmer's Dig.* 57,) the complainant may file his exceptions at any time within thirty days after the time limited or granted for filing the answer.

By the twenty-third section of the same act, a rule is to be entered of course with the clerk, either in term time or vacation, to refer the exceptions to a master, who shall decide and report upon them within thirty days after they are filed.

By the eleventh rule of this court, ("Of Exceptions," sec. 2,) exceptions for insufficiency shall not be entered until six days after service of a copy of the exceptions on the defendant or his solicitor.

Injunctions here are usually granted without notice, upon the case made by the bill, upon the oath of the complainant alone; and frequently, very properly, dissolved upon the coming in of the answer denying the whole equity of the bill.

In cases where delay is the only object of the party, injunctions are too often sought as the most convenient way of procuring it; and the longer a motion to dissolve can be kept off, the greater the chance of success.

Now, under the sections of the act and the rule referred to, it is easy to perceive that in some cases sixty days and more may intervene between the filing of the answer and the disposition of the exceptions. If, therefore, the existence of undetermined exceptions be a good cause for continuing the injunction, it would in many instances amount to a denial of the motion to dissolve, and defeat the object of an answer, however full and true, and however promptly filed.

Such has not been, and should not be, the practice of this court, under the existing rules. It is better to hear the exceptions on the argument of the motion to dissolve. If they are well taken, then the answer does not deny the whole equity of

[Wyckoff et al. v. Cochran.]

the bill ; but if not well taken, they present no ground of objection, and the answer may be sufficient to justify a dissolution of the injunction.

Upon examining the bill and answer, and the exceptions, I am satisfied that the whole equity of the bill, upon which the injunction was granted, has been fully denied, and that the motion to dissolve should prevail, with costs.

Order accordingly.

WILSON KNOTT v. The RECEIVERS of the MORRIS CANAL
AND BANKING COMPANY.

In the disposition of the trust property in their hands, receivers have a discretion, *for* the due exercise of which they are responsible to the court, and *is* the exercise of which they are subject to its control.

Receivers are not, like executive officers, bound to sell for the highest price, without regard to the purchaser, or to the disposition he may make of the property.

Where the receivers of the Morris Canal and Banking Company advertised that proposals would be received by them until a specified day for leasing the canal for one year, *held*,

That the advertisement did not bind the receivers to take the offer of the highest bidder, nor limit them to a certain time within which to receive bids.

ON the twenty-fourth of January, eighteen hundred and forty-four, the receivers of the Morris Canal and Banking Company reported to the court, that the existing lease of the canal being about to expire on the first day of April, then next, they had received various proposals for renting the same ; that upon deliberation, they had decided to give the term to Mills and Sykes, the present lessees, subject, however, to the approval and confirmation of the court, and asking the direction of the court in the premises.

On the same day, Wilson Knott filed his petition to the chancellor, under oath, stating that the said receivers had caused

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advertisements to be published in several newspapers of the state, notifying the public that written proposals would be received by them, at their office in Jersey City, until the eleventh day of January instant, for leasing the Morris Canal and the feeders, from the termination thereof at Newark, to the Delaware river, for the term of one year from the first day of April next. That the petitioner, on the said eleventh day of January, put in written proposals for the said lease, offering to pay therefor three thousand dollars, and to give the requisite security for the fulfillment of the contract.

That the only proposals for the said contract besides the petitioner's, were one from A. P., proposing to lease the said canal for two thousand and twenty dollars; one from D. K. A., proposing to lease the same for one thousand five hundred and twenty-five dollars, and one from Mills and Sykes, proposing to lease the same for one thousand five hundred dollars, for the year.

That after the biddings were opened, and after the day limited for receiving bids was past, the said Mills and Sykes were permitted to increase their bid, without an opportunity of further bidding being afforded to others. That the petitioner is ready to fulfil the contract on his part, agreeably to his bid, and to the said proposals; or if the bidding should be opened, he is prepared to offer a larger sum than has yet been bid for the said lease.

The prayer of the petition is, that the receivers be directed to execute to the petitioner a lease for the said canal, agreeably to the term of the said proposals and his bid, or that the biddings be re-opened, and that the receivers be directed to give public notice thereof; that in the meantime, the receivers may be restrained from executing any lease for the said canal, and that if they have executed any such lease, that it may be declared inoperative and void, and be ordered to be given up to be cancelled.

Upon filing the petition, an order was made that the receivers, and also the said Mills and Sykes, should show cause, on the

[*Knott v. The Receivers of the Morris Canal, &c.*]

twenty-seventh day of January instant, why the prayer of the said petition should not be granted, and that the petitioner have leave to examine the receivers upon interrogatories, touching the matters set forth in the petition; that the parties have leave to take affidavits; and that Mills and Sykes, the proposed lessees of the canal, be at liberty to avail themselves of the same rule. An order was also made upon the receivers, to certify to the court the facts and circumstances relating to the matters set forth in the said petition.

Pursuant to this order, the receivers filed their report, accompanied by a lease to the said Mills and Sykes, and pray a confirmation of the same. Interrogatories were exhibited to and answered by the receivers, and depositions of witnesses taken; from which it appears that the receivers, on the twenty-ninth

December, eighteen hundred and forty-three, resolved to advertise for proposals for leasing the canal and its appendages for the year from the first of April, eighteen hundred and forty-four; and that they advertised accordingly, that they would receive proposals at their office in Jersey City, until the eleventh January, then next.

That proposals were delivered to one of the receivers from the petitioner, offering to lease the canal with its appendages for three thousand dollars; from Daniel K. Allen, for fifteen hundred and twenty-five dollars; and from Andrew Parsons, in the evening of the same day, at Paterson, for two thousand and twenty dollars; and that Mills and Sykes made proposals on the same day, to take a lease on certain contingencies at fifteen hundred dollars;—none of which propositions were accepted.

From a conversation of one of the receivers, it became known that proposals had been made, and on the twelfth of January Mills and Sykes further proposed to lease the property for three thousand dollars; and on the thirteenth of January made still another proposition.

That the receivers, believing Mills and Sykes the more suitable and competent lessees, and the rent offered by them being equal to that offered by any others, agreed with them upon

[*Knott v. The Receivers of the Morris Canal, &c.*]

the terms contained in the lease which they now desire to have confirmed.

The petitioner, by his counsel, now complains, that the receivers have acted improperly in disclosing the terms of the sealed proposals, and in entertaining propositions made after the eleventh of January, the time mentioned in the advertisement; and that they have shown partiality and favoritism in their determination.

S. G. Potts and Wall, for the petitioner.

E. Vanarsdale, for the receivers.

Vroom, for Mills and Sykes.

THE CHANCELLOR. In the disposition of the trust property, the receivers have a discretion, for the due exercise of which they are responsible to the court, and in the exercise of which they are subject to its control. The receivers being officers of the court, and entitled to its protection, will be sustained in their acts done in good faith, and without prejudice to the rights of those interested.

In leasing the canal and its appendages, great prudence and care were required on the part of the receivers. They are not like executive officers, bound to sell for the highest price, without regard to the purchaser, or the disposition he may make of the property; the object is not merely to obtain the greatest amount of rent, but also to secure the proper use and due repair of the canal and its locks, bridges, dams, &c. and the continuance and increase of business upon it, that as far as practicable the reversionary interest of the creditors and stockholders may be promoted.

It was proper, therefore, by advertising for proposals, to procure as many bidders as they could, that from them they might select such as would not only pay the best rent, but take also the best care of the canal, and otherwise promote, and if possible, increase the value of the trust property.

[*Kaett v. The Receivers of the Morris Canal, &c.*]

The advertisement for proposals was not such contract as would bind the receivers to take the offer of the highest bidder, nor limit them to a certain time within which to receive bids. It was used as the means of procuring offers, and could not control them in the exercise of a proper discretion in the choice of those offers. Nor did any person, by a proposal, acquire any right under or in consequence of the advertisement, until his proposition was accepted.

In ordinary sales of property by auction, neither seller nor buyer is bound until the bid is accepted: 3 *Term. Rep.* 148. And surely, a rule equally liberal is applicable to receivers, in a transaction like this.

If the petitioner acquired no right under the advertisement and his proposal, he cannot complain, even if in fact he is quite as competent to manage the canal as the proposed lessees. The preference shown to others may disappoint his hopes and wound his feelings, but cannot affect any legal right.

The only question remaining is, whether the receivers have acted discreetly in accepting the proposals of Messrs. Mills and Sykes, and in making the agreement with them, mentioned in the lease now submitted.

It appears that the bridges, aqueducts, locks and inclined planes of the canal are in a condition that require a great deal of attention and repair.

That the principal business of the canal is the transportation of coal, in which there is great competition; and experience in the coal business is likely to be quite necessary to the profitable employment of the canal. Of the proposed lessees, one is a dealer in coals, the other a professed civil engineer; both bear the character of worthy and competent men, and are said to be fully responsible for the performance of the covenants of the lease; and they offer as much rent as any other person.

It would seem then, that in selecting these persons, the receivers have not acted without due discretion, nor without proper regard to the interests of the trust fund.

[*Knott v. The Receivers of the Morris Canal, &c.*]

It is unnecessary to institute any comparison of the respective qualifications of the petitioner and the proposed leasees. It is enough that the receivers, who are acquainted with or have the means of knowing the character and capacity of all, have in the exercise of their discretion selected the latter, and as their choice does not appear to be improper, it must be confirmed.

The prayer of the petitioner, therefore, cannot be granted. The lease will be referred to a master, to inquire into its terms, and the sufficiency of the security offered, and report the same with all convenient speed.

Order accordingly.

ABRAHAM RICHARDS and DANIEL SELDEN v. The MORRIS
CANAL AND BANKING COMPANY.

The report of a master upon the accounts of receivers requires confirmation, and may be excepted to. The several items of the account may be investigated.*

It seems that a creditor is not allowed the costs of proving his claim before the master. But a creditor complaining of the proceedings before the master in settlement of the receivers' accounts may be allowed his costs, to be paid out of the fund, or by the receivers, at the discretion of the court.

Notice should be given of an application on behalf of the creditors, for leave to file exceptions to the master's report. An order for leave to file exceptions, made without notice, discharged.

E. Vanarsdale for the receivers, cited *Bishop v. Willis*,² *Vesey, sen.* 113; 1 *Smith's Chan. Prac.* 643; 2 *Ibid*, 358; *Shewell v. Jones*, 1 *Con. Eng. Chan.* 400; *Abell v. Screech*, 10 *Vesey*, 356; *Calvert on Parties*, 53; *Cammack v. Johnson*, 1 *Green's Chan.* 163; 5 *Paige*, 131; 7 *Paige*, 514; 2 *Atkins*, 21; 2 *Edwards*, 426; 1 *Newland's Chan. Pr.* 110, 165.

* See *Mechanics' Bank of Philadelphia v. Bank of New-Brunswick*, ante, vol. ii. page 437.

[*Richards et al. v. The Morris Canal and Banking Co.*]

S. G. Potts and Wall, for petitioners, cited *Elmer's Dig.* 36, *pl.* 23.

THE CHANCELLOR. At the last term, James M. Porter, Daniel K. Allen, Andrew Parsons, John Strader, junior, and Charles J. Ihrle, on behalf of themselves and others, creditors of the Morris Canal and Banking Company, filed their petition complaining of the proceedings of the receivers of the stockholders and creditors of the said company, and of their accounts of expenses and charges for services, settled and allowed by one of the masters of this court, and praying that the appointment of the receivers may be revoked and proper persons appointed in their stead.

Upon which petition, and on motion on behalf of the petitioners, an order was made that the creditors have leave to file exceptions to the report of the master, and that cause be shown on the first day of this term, why the prayer of the petitioners should not be granted, and other receivers appointed; and that a copy of the petition and order be served upon the solicitor of the complainants and on the receivers within ten days; and that the parties have leave to take affidavits, &c. An order to set down the cause at this term, was also made. A motion is now made on behalf of the receivers, to discharge and vacate the orders so made.

These orders having been made *ex parte*, at the peril of the movers, are to be considered without prejudice, and as if they were now originally sought.

The first objection is, that the receivers, being officers of the court, the report of the master upon their account cannot be excepted to, nor the items of the accounts considered; but that upon suggestion of parties aggrieved, the court will call upon the master to certify the principle upon which he acted.

Such is the practice in England, as appears in the case of *Shewell v. Jones*, 2 *Simons v. Stuart*, 170; 1 *Com. Eng. Chan.* 400; which likens the report of a master, upon receivers'

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accounts, to his report on taxation of costs, which requires no confirmation and cannot be excepted to.

But I cannot learn that such has been the practice in New-Jersey, under the act to prevent frauds by incorporated companies, passed the sixteenth of February, eighteen hundred and twenty-nine, and in the absence of any practice to control me, I should hesitate to adopt the English practice.

From the proceedings and determination of the receivers, our statute gives an appeal to the chancellor, who is to hear and determine the matter in a summary way, and make such order touching the same as shall be equitable and just. The complaint here is of the proceedings and determination of the master, upon which our statute is silent.

Upon looking into the papers in the cause, it appears that the order appointing the master was *ex parte*, and the proceedings before him *ex parte*, without notice to any of the creditors or their solicitor.

We may, without any imputation of fraud on the part of the receivers, or of impropriety or negligence on the part of the master, readily suppose, that many items of this long account might have been allowed and passed by him, with great injustice to the creditors. If then, we can only inquire into the principle upon which he settled the account, without examining the items in any case, there may be a wrong without a remedy, and very great injustice without the means of redress.

It would seem proper then, that some mode of reviewing the proceedings of the master should be adopted; and I know of none better than that of filing exceptions; it is simple and convenient, and in conformity with the practice of this court in other cases, and of other accounting courts.

This too, seems to have been the view of chancellor Vroom, who, in the case of the *Mechanics' Bank of Philadelphia v. the Bank of New-Brunswick*, granted liberty to a creditor to make application for leave to appear by a separate solicitor, and file exceptions to the report of a master upon the receivers' account.

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It was also the opinion of chancellor Dickerson, who in the same case afterwards made an order that cause be shown why decree, confirming a report of the master, "should not be opened, and the creditors have leave to appear by their own solicitors and file exceptions to said report or take such other proceedings as may be deemed necessary or proper, to review and reconsider the said report, and the several items and charges therein stated, reported and allowed."

It is, in my opinion, proper to review the proceedings of the master upon exceptions filed.

It is said by the counsel, that costs always follow exceptions, and that a creditor coming in is not allowed his costs, and thus, therefore, exceptions cannot be filed.

The only difficulty that I see in this syllogism is, that the second proposition of it is not true as applied to this case.

The doctrine in *Abell v. Screech*, 10 Vesey, 355, cited by the counsel of the receivers, is, that a creditor is not allowed his costs of proving his original claims before the master.

And in *Calvert on Parties to suits in Equity*, 55, 6, (*Law lib. vol. 17.*) it is laid down, "that costs out of the fund will be allowed to the creditor who files the bill, and not to those who come in before the master," having reference clearly to the original claim.

But I see no reason why, under some circumstances, creditors complaining of the proceedings before the master in settlement of the receivers' accounts, should not be allowed their costs, to be paid out of the fund, or by the receivers, at the discretion of the court.

It is also said, that the report of the master in such case needs no confirmation, and therefore no exceptions can be filed.

But if two cases are any indication of the practice upon this point, we have it in the case of the *Mechanic's Bank of Philadelphia v. Bank of New-Brunswick*, before referred to, and in this very case, where the report excepted to has been confirmed by decree.

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But another objection to these proceedings is, that the order to file exceptions was taken without notice.

It struck me at first as remarkable that it should be necessary to give notice of an application for leave to file exceptions, the objections to which would seem somewhat to involve the merits of the case; but on looking at the order of chancellor Vroom, before referred to, it is obvious that the exceptions were dismissed because they were filed by the exceptants' solicitor, and the leave to be sought was to appear by a separate solicitor and take separate exceptions. The order of chancellor Dickerson was, that cause be shown why the defendants should not appear by their own separate solicitors.

And there is propriety in this; the solicitor in the suit is, *sub modo*, solicitor of all the creditors, and if he is to be superseded, it should be upon due notice at least to him.

The order, therefore, for leave to file exceptions in this case should be vacated and discharged, and the petitioners be permitted to take an order that cause be shown during the term why leave should not be granted to appear by separate solicitors, and file exceptions.

Objections have been raised to the petition, but I can see nothing fatal to it. It is signed by some of the creditors for themselves and others. Although it may not be good for the others, this is no reason why it is not good for those who have signed.

The prayer of the petition is confined to the revocation of the appointment of the receivers, and for the appointment of others.

As to this, the parties may amend if they please. But I would prefer to see a more correct and formal petition filed.

Order discharging the rule for leave to file exceptions, and all proceedings under the said petition.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY,

APRIL TERM, 1844.

PATRICK MAGENNIS v. STEPHEN B. PARKHURST.

A party under an attachment for contempt for an alleged breach of an injunction, is not confined to his answers to the interrogatories exhibited to him, but may examine witnesses to exculpate himself from the charge.

Should the depositions on the part of the defendant be taken by leave of the court?—*Quers.*

The party alleging a contempt of court by breach of an injunction, must make it out clearly to the satisfaction of the court.

If the accused deny the contempt, or do not clearly show it by his answers, the prosecutor may examine witnesses to prove it.

The command of an injunction must be implicitly obeyed, but it is the spirit and not the letter of the command to which obedience is required.

An attachment for contempt, being in the nature of a criminal proceeding, costs are not usually allowed.

E. B. D. Ogden, for defendant.

Barkalow and *A. S. Pennington*, for complainant.

THE CHANCELLOR. The defendant, Parkhurst, having been arrested for a contempt of court, by an alleged breach of

[Magennis v. Parkhurst.]

the injunction granted in this case, and being under recognizance, now moves an order for his discharge, upon the ground that he has purged the contempt.

Interrogatories were exhibited and answered by the defendant, and depositions of witnesses taken by both parties, upon notice and without the order of the court. On the hearing, a question was raised by the counsel of the complainant, as to the admissibility of the depositions taken on the part of the defendant, and it was insisted that the defendant is confined to his answers to the interrogatories exhibited to him, and cannot examine witnesses to exculpate himself from the charge. The depositions were admitted, subject to the opinion of the court, on further consideration.

On examining the point raised upon the admissibility of the depositions taken on the part of the defendant, I am satisfied that it is proper they should be read.

The party alleging a contempt of court by breach of an injunction, must make it out clearly to the satisfaction of the court. To do this, he may examine the party accused upon interrogatories, and use the answers as proof. If the accused deny the contempt, or do not clearly show it in his answers, the prosecutor may, as "of course," examine witnesses to prove it. This, I think, is proper, as well upon principle as by authority. In addition to *Blackstone's Com.* 288, and 1 *Com. Dig.* 599, cited by the counsel of the complainant, we have other authorities, and particularly that of *Newland's Ch. l'r.* 392, explicitly directing this course.

The depositions on the part of the defendant, it seems, in England are to be taken by leave of the court. Should that practice be adopted here, the depositions on the part of the defendant were properly read, as the court will generally sanction what it would have ordered, if no prejudice to the other party arise from it.

'As to the merits. The object of the injunction is to prevent any injury to the complainant, by the obstruction of the water flowing along the tail-race of his mill, or exposing it to obstruc-

[*Magennis v. Parkhurst.*]

tion from the Passaic river, by breaking down or injuring the embankment between the race and the river.

It was not to prevent the defendant from making a proper use of his own premises, nor from working in the race or along the embankment, so that he did not obstruct the water or injure the embankment, or render it less adequate to the purposes for which it was constructed.

The command of the injunction must be implicitly obeyed ; but it is the spirit, and not the letter of the command, to which obedience is required.

The answers of the defendant to the interrogatories, clearly deny any contempt, either by obstructing the water-course, or injuring the embankment.

It is true that the stone foundation at the south-west corner of the defendant's mill, was put in the stream ; but it was done, as he says, in his absence, contrary to his directions, and with the consent of the complainant, as he was informed. If so, this is no breach of the injunction.

Three posts were placed longitudinally in the stream, and two posts, part of the frame-work for the wheel, were also placed there ; but from the answers of the defendant and the weight of the testimony of the witnesses, they do not appear to have obstructed the stream. Whether this is to be attributed to the enlarging of the race, or the deepening of it, or to any other cause, the evidence is not such as to authorize the conclusion that the stream has been obstructed and the water backed upon the complainant's wheel.

The embankment was also cut away in enlarging the race-way ; but it does not appear that it was thereby injured, or rendered less adequate to keep out the waters of the Passaic river, or that the complainant was more exposed to injury from back water.

I conclude, therefore, that the defendant has fully denied the contempt, and that the complainant has failed to prove it against him, and I adjudge and direct that the defendant be discharged from his recognizance.

[Magennis v. Parkhurst.]

This being in the nature of a criminal proceeding, costs are not usually allowed, and should not be in this case: *Rex v. Plunkett*, 3 Burr. 1329.

The defendant, by working at all in the stream, exposed himself to censure. A more prudent course would have been, to ask a modification of the injunction, or such a construction of its terms as would have enabled him to do the work he wished, without the hazardous experiment which he has made.

The complainant had reason to think he had cause of complaint, although he may have mistaken the cause of the injury of which he complained. He is not to be regarded as making a vexatious and wholly ill-grounded complaint, although the strong and aggravated case represented in the depositions on which the order for attachment was founded, is not made out on the present hearing.

WILLIAM B. MANNING and Wife et al. v. DAVID S. CRAIG,
Surviving Executor of JOHN TERRILL, et al.

A testator bequeathed as follows:—"Two hundred and fifty-one shares of stock that I hold in the great western turnpike company, in the state of New-York, to remain unsold, and the dividends arising thereon I direct to be equally divided between my sons, J., D. and E., my daughters, M., M., S. and D., and my grand-child, O. S. T." *Held*, That the turnpike stock is an absolute specific legacy to be enjoyed by the receipt of the dividends.

The gift of the produce of a fund without limit as to time, is a gift of the fund; and the interest of each of the legatees is vested and assignable.

The court of chancery will lend its aid to carry out the intent of the testator, and to save the fund from loss or great depreciation, may change the mode of enjoyment.

THIS bill was filed by legatees under the will of John Terrill, deceased. One of the objects of the bill was, to recover from the surviving executor the dividends upon certain turnpike stock, and to have the stock itself divided among the legatees.

[Manning v. Craig et al.]

The bequest was as follows. "Item. Two hundred and fifty-one shares of stock that I hold in the great western turnpike company in the state of New-York, to remain unsold, and the dividends arising thereon I direct to be equally divided between my sons, Job, Dayton and Ephraim ; and my daughters, Mary, Margaret, Sarah and Deborah ; and my grand-child Oliver S. Terrill, son of my son Abel Terrill." Other matters were involved in the controversy, not, however, affecting the points decided by the chancellor. There were several parties interested, and answers were filed by different defendants. The cause was heard upon bill, answers, replication and proofs.

Wall, for complainant.

I. H. Williamson, for surviving executor.

Lupp, for S. Mundy.

G. A. Vroom, for the administrator of D. T. Terrill and others.

THE CHANCELLOR. The turnpike stock is an absolute specific legacy, to be enjoyed by the receipt of the dividends.

The gift of the produce of a fund, without limit as to time, is a gift of the fund.

The interest of each of the legatees is therefore vested and assignable.

The court of chancery will lend its aid to carry out the intent of the testator ; and to save the fund from loss or great depreciation, may change its mode of enjoyment.

In this case, as the stock is depreciating, I think it should be divided among the legatees or their representatives.

In taking the account, the master will inquire,

First, Who are entitled to the stock and its dividends, and the amount of their respective interests.

Secondly, What amount of dividends the executor has received and paid out, and to whom paid ; how much remains in his hands, and to whom it is due, making all just allowances.

Order accordingly.

CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF THE STATE OF NEW-JERSEY.

JULY TERM, 1844.

JOHN WHITTEMORE v. JOHN G. COSTER et al.

A court of equity will sustain an original bill filed to correct a former decree of the same court.

BILL for relief, filed October first, eighteen hundred and forty-two. The bill states that the Monroe Manufacturing Company, by deed bearing date on the thirty-first day of August, eighteen hundred and thirty-nine, for the consideration of five thousand dollars, conveyed to the complainant a lot of ground in Paterson, in the bill of complaint particularly described, with a mill and buildings thereon, which said deed was duly acknowledged and recorded. That upon receiving the said deed, the complainant immediately went into possession of the said premises; that his possession has been public and notorious, and that he has spent large sums of money in making repairs and improvements thereon. That at the time of the purchase, he believed the said premises to be clear of incumbrances, and he paid a full consideration for a perfect and unincumbered title thereto.

That on an investigation of the title to the said premises at the time of his purchase, the complainant ascertained that the premises were conveyed to the Monroe Manufacturing Compa-

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by the "Society for establishing useful Manufactures," by deed dated on the thirteenth of August, eighteen hundred and thirty-eight, duly acknowledged and recorded. That the title of the said the Society for establishing useful Manufactures to the said premises was ancient and unquestioned, and that the premises had not been incumbered by the Monroe Manufacturing Company.

That the complainant had no knowledge or intimation of any pretended incumbrance or claim upon the said premises, until, about two months before the filing of his bill, he learned that the said lot was advertised for sale, upon an execution issued out of this court, upon a decree rendered in a cause in which John G. Coster is complainant, and the Monroe Manufacturing Company and Andrew Parsons are defendants.*

That the complainant has ascertained that the said decree was obtained by the said John G. Coster, upon a bill filed by him to foreclose the equity of redemption in certain premises, mortgaged to said Coster by Francis Mann and John W. Berry, on or about the fourteenth of February, eighteen hundred and thirty-one, to secure the payment of a bond for two thousand dollars, with interest. That the consideration of the said bond and mortgage was a part of the purchase money of said mortgaged premises, conveyed by said Coster to Mann and Berry, and that the premises so conveyed, included the lot purchased by the complainant of the Monroe Manufacturing Company. That the premises conveyed by Coster to Mann and Berry, passed by sundry mesne conveyances to Samuel G. Wheeler, and were by him incumbered by a mortgage to secure the payment of sixteen thousand dollars, which is now held by Andrew Parsons, and from the said S. G. Wheeler to the Monroe Manufacturing Company.

That in the supreme court of this state, at the term of May, eighteen hundred and thirty-eight, a judgment was recovered by the Society for establishing useful Manufactures, in an action of ejectment brought by them, for the recovery of the lot so as

* See ante, vol. i. page 467.

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aforesaid conveyed to the complainant, and a writ of *habere facias* having issued upon the said judgment, and being about to be executed, the Monroe Manufacturing Company purchased the said lot, and procured a title therefor from the Society for establishing useful Manufactures; the previous title acquired by them for said premises, under the said John G. Coster, being utterly defective.

The bill further charges, that the said John G. Coster had notice of the said action of ejectment, and refused to defend the same. That on the bill filed by him as aforesaid against the Monroe Manufacturing Company, to foreclose the mortgage given by Mann and Berry, the said The Monroe Manufacturing Company claimed, and were by the decree of this court allowed, as a set off against the amount of the said mortgage, the damages sustained by reason of the defect of title of the said John G. Coster in the lot of complainant, conveyed or pretended to be conveyed by the said Coster to Mann and Berry. That a decree was made in the said cause for the sale of so much of the mortgaged premises described in the bill of complaint as would satisfy the balance due on the mortgage of the said Coster, after deducting the said damages; and an execution issued thereupon to a master of the court, by virtue of which he had advertised for sale the whole of the said mortgaged premises, including the lot of the complainant, and was about to proceed to sell the same.

The bill further states, that the Monroe Manufacturing Company had been declared to be insolvent, and receivers had been appointed.

Charges that Coster, being one of the grantors to Berry and Mann, knew, or was bound to know, the extent of the grantor's title, and that it did not embrace the lot of the complainant; and that the said Coster, well knowing that the said lot, though embraced within the lines of his mortgage, was not bound thereby; that it had been recovered by the Society for establishing useful Manufactures, in an action of ejectment against the title through which the mortgage was derived, and

[Whittemore v. Coster et al.]

that it was afterwards purchased by the complainant for a valuable consideration, unlawfully proceeded to take a decree for the sale of the whole of the premises described in his mortgage, and to procure an execution to be issued accordingly, and insists upon making sale, by virtue thereof, of the lot so as aforesaid conveyed to the complainant.

The prayer of the bill is, that the court will decree that neither the mortgage of Coster or Parsons constitutes any lien or encumbrance upon the complainant's lot, and that the decree and execution in the suit of the said Coster, may be so rectified and amended, as not to embrace or affect the lot of the complainant; or that the court by its order and decree, will perpetually restrain the said Coster from proceeding to a sale of the complainant's lot, by virtue of the said execution. That the said Parsons may be restrained from proceeding upon his mortgage against the lot of the complainant, and that the other defendants may be decreed to have no right or interest therein.

A decree *pro confesso* was taken against all the defendants except John G. Coster, who demurred to the bill. Hearing upon the demurrer.

E. Vanarsdale, for defendant, in support of the demurrer.

E. B. D. Ogden and *A. Whitehead*, for complainant, contra.

Cases cited by defendants' counsel: *Cooper*, Pl. 182; 2 *Anthony*, 469; 2 *Con. Eng. Chan.* 439; *Ibid*, 441; 12 *Con. Eng. Chan.* 507; 1 *Mad.* 57; 4 *John Chan.* 202; 2 *Mason*, 100, 1.

Cases cited by complainant's counsel: *Mitford's Pl.* 147; *Cooper's Eq.* 185; 1 *Atkyns*, 282; 12 *Vesey*, 58; 1 *Vernon*, 53; 2 *Sch. and Lef.* 367; 6 *John. Chan.* 139, 157; *Saxton's R.* 35; *Story's Eq.* (ed. of 1838,) 226, note, 227; 5 *Mad.* 94; 1 *Story's Eq.* 74; *Culvert on Parties*, 1; 12 *Con. Eng. Chan.* 530.

[Whittemore v. Coster et al.]

THE CHANCELLOR. There is a decree *pro confesso* against all the defendants but John G. Coster, who demurs to the bill for multifariousness; and first, because of unnecessary parties.

The defendants, if not all necessary, are not improper parties.

Most of them have an interest in the object of the suit, and are, therefore, proper and necessary parties: *Calvert on Parties*, ch. 1, sec. 1, p. 3; *Story's Eq. Pl. sec. 77, 97*, and cases there referred to.

Coster is made defendant because he was the complainant in a former bill, and is charged with wrongfully pressing a sale of the premises claimed by the present complainant, Whittemore.

Parsons, as the assignee of the mortgage given by Wheeler to Lawrence, on the same premises, and entitled to the surplus.

Mann and Berry, as the mortgagors to Coster, and obligors responsible for the residue on the bond, after deducting the amount of the sales, and directly interested in the result of those sales.

The Monroe Manufacturing Company, as mortgagors to Coster, and grantees of the equity of redemption, are not necessary, but are proper and usual parties: *Vreeland v. Loubal*, 1 *Green's Chan.* 104.

The complainant may make them parties, if he choose, and the bill is not on that account demurable: *Chester v. King and others*, 1 *Green's Chan.* 405.

The receivers, as the representatives of the company, are to be regarded in the same light.

The second ground of objection is, multifariousness in the object of the bill, which seeks a reversal or correction of a former decree.

This presents a more serious question, namely, whether a court of equity will sustain an original bill filed to correct a former decree.

Judge Story, in his *Equity Pleadings*, 342, sec. 426, says,

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"There is no doubt of the jurisdiction of courts of equity, to grant relief against a former decree, where the same has been obtained by fraud and imposition; for these will infect judgments at law, and decrees of all courts; but they annul the whole in the consideration of courts of equity. This must be done by an original bill; and there is no instance of its being done by petition, though it seems once to have been thought that a decree as well as an interlocutory order, could be set aside for fraud, by petition only. Where a decree has been so obtained, the court will restore the parties to their former situation, whatever their rights may be."

In *Sheldon v. Fortescue Aland*, 3 P. W. 111, lord chancellor King says, "I admit even a decree, much more an interlocutory order, if gained by collusion, may be set aside on petition; *a fortiori*, may the same be set aside by bill." But it is supposed that this was said in relation to a case in which the decree had not been enrolled, and where the fact of fraud could not be controverted.

And in *Mussel v. Morgan*, 3 Bro. Chan. R. 74, lord Thurlow expressly overruled the doctrine of relief by petition, and said he could see no reason why it might not be obtained by an original bill, in the nature of a bill of review.

In *Cocker v. Bevis*, 1 Chan. Cases, 61, a bill for such purpose was sustained, not so much on the ground of fraud, as on its own special circumstances, namely, that the original decree of foreclosure was to be entered unless the money was paid at a certain time, and the money was not paid, from circumstances of inevitable necessity, without wilful default.

There is no express allegation of fraud in this bill, but the facts set forth are such that it is difficult to divest them of the charge of fraud.

If the defendant, Coster, as the bill charges and the demurrer for the purpose of this argument admits, knew that the description of his mortgage embraced more land than the mortgagor had title to, yet took his decree for the whole, and insists upon

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selling the whole, to the prejudice of the complainant, it looks very much like fraud.

If the allegation is untrue, he may call its truth in question by his answer, and relieve himself of the implication of fraud.

Whether there is fraud or not in the case, the special circumstances of it forbid the allowance of the demurrer.

The defendant may avail himself of the objection, if there is anything in it, by plea or answer, and I deem it best to retain the bill for further inquiry.

Let the demurrer be overruled, with costs.

Order accordingly.

DAY v. DAY.

Direct evidence is not required to sustain the charge of adultery.

The circumstances to sustain the charge must be such as to lead the guarded discretion of a reasonable and just man to the conclusion that the crime has been committed.

Lupp, for complainant.

Vroom, for defendant.

THE CHANCELLOR. The complainant filed her bill for a divorce *a vinculo matrimonii*, upon the ground of adultery by the defendant, her husband.

The marriage is admitted by the answer, but the adultery denied.

There is no direct evidence of the fact of adultery, and the question is, whether the circumstances detailed in the evidence sustain the charge.

If direct evidence of the fact should be required in such cases, it must generally render relief impracticable. But there must be such proximate circumstances proved, as will satisfy the le-

[Day v. Day.]

gal conviction of the court, that the crime has been committed.

In *Williams v. Williams*, 1 *Hagg. Con. R.* 299; lord Stowell said "it is a fundamental rule of evidence on this subject that it is not necessary to prove the direct fact of adultery, because if it were otherwise, there is not one case in an hundred where that case would be attainable; it is very rarely, indeed, that the parties are surprized in the direct fact of adultery. In every case, almost, the fact is inferred from circumstances that lead to it by fair inference, as a necessary conclusion, and unless this were so held, no protection whatever could be given to marital rights."

"The only general rule to be laid down is, that the circumstances must be such as to lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash, intemperate judgment, moving upon appearances, that are equally capable of two interpretations. Neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man."

Whatever convinces of the consummation of the act, will be sufficient proof of the charge: 2 *Phil. Ev.* 153; 2 *Greenleaf's Ev.* 34.

A detail of the circumstances of this case is unnecessary. They cannot fail to lead the guarded discretion of any reasonable and just man to the conclusion, that the offence charged was committed. There was at least that degree of imprudence from which a court is bound to infer guilt.

I am constrained, therefore, to grant the prayer of the bill, and to decree a divorce from the bond of matrimony, with costs of suit; and to refer the matter to a master, to inquire and report what alimony should be allowed, and what provision should be made for the maintenance of the children of the parties.

And the complainant will have leave to apply to the court for further relief, if need be.

Decree accordingly.

STOUTENBURGH, DAY AND COMPANY V. PECK, PIERSON
AND COMPANY, and AARON PECK.

The general rule is, that an injunction properly granted, will not be dissolved till all the defendants have answered.

It is the duty of the complainant to take the requisite steps to compel an answer from all the defendants, and if he neglect to do so, the injunction may be dissolved though a part only of the defendants have answered.

If the defendant, upon whom rests the *gravamen* of the charge, answers, denying the whole equity of the bill as against him, the injunction will be dissolved.

BILL for an injunction to restrain proceedings at law, filed on the sixth of June, eighteen hundred and forty-two, and an injunction issued. Answer by part of the defendants. Motion to dissolve the injunction upon the denial of the equity of the bill by the answer. Hearing at April term, eighteen hundred and forty-four.

O. S. Halsted and *I. H. Williamson*, for Peck, Pierson and Company, in support of the motion.

A. C. M. Pennington and *W. Pennington*, contra.

Cases cited by defendants' counsel: 2 *John. Chan.* 202; 1 *Hopkins*, 147; 1 *John. Chan.* 108; 1 *Green's Chnn.* 192, 452; 6 *Vesey*, 678, 680; 14 *Con. Eng. Chan.* 799; 1 *John. Chan.* 302, 148; *Wyatt's Pr. Reg.* 234.

THE CHANCELLOR. The complaint of the bill is, that the defendants, Peck, Pierson and Company, have sued the complainants at law, upon two promissory notes given by the complainants, and of which the defendant, Aaron Peck, by an arrangement between him and the complainants, was bound to pay three-fourths.

That the notes really belong to Aaron Peck, who is prosecuting them in the name of Peck, Pierson and Company, for his

[*Stoutenburgh, Day & Co. v. Peck, Pierson & Co.*]

t ; or if the notes belong to Peck, Pierson and Company, look them after maturity, with full knowledge of the equity against Aaron Peck, and without consideration, and the notes subject to all the the equities existing against Peck. An injunction was prayed and granted, to stay proceedings at law.

The defendant, Aaron Peck, has not answered, and this is used as a reason why the injunction should not be dis-

The bill was filed June the sixth, eighteen hundred and forty- and the complainants have had a year and ten months which to procure the answer, and if they have neglected it, should not set up the want of the answer against those complainants who have answered, and have no power to compel co-defendant to answer. The complainants should have taken the requisite steps with all diligence to compel the answer: *Depeyster v. Graves and others*, 2 *John. Chan.* 8.

Principle. The general rule is, that an injunction properly granted will not be dissolved till all the defendants have answered.

When there be two defendants, the court will not ordinarily dissolve the injunction till both have answered." *Wyatt's Precedents*, 234.

But the rule has exceptions, and is subject to discretion and modification." One of the exceptions is in favor of him on whom all *gravamen* rested, and who has fully answered. *Dever v. Graves and others*, 2 *John. Chan. Rep.* 149 ; *Johnson v. Doubleday*, 1 *Vesey and Beame*, 497 ; *Eden on Injunction*, 115 ; 1 *Story's Eq.*

In *Peck, Pierson and Company v. Stoutenburgh, Day & Co.*, here the *gravamen* is upon Peck, Pierson and Company, upon their answer depends the right of the complainants to have the injunction continued or dissolved.

Peck may have answered and admitted the equity of the complainants' bill as against him ; and yet, if the defendants,

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Peck, Pierson and Company, deny all the equity as against them, the injunction must be dissolved.

The question then is, have the defendants, Peck, Pierson and Company, fully answered and denied all the equity against them.

They deny all knowledge of any obligation on the part of Aaron, to pay, any part of the notes; and allege that they received one of the notes from Aaron, for the consideration of the whole amount due upon it, paid by them to him in money before its maturity, in the fair course of trade; and that they are the *bona fide* holders of it.

That being the indorsers of the other note, at the request and for the accommodation of Aaron Peck, they took it up from Bullock, Lyman and Company, to save a prosecution, by giving their own notes, indorsed by these complainants; and that they have since paid the notes so given for it.

That they received the last note after maturity, and are now the *bona fide* holders of it.

That the suit is brought in their name and for their use, and not for the use or benefit of Aaron.

I am satisfied that this is a full, fair and unequivocal denial of all the equity of the bill charged against these defendants, and that the injunction should be dissolved, with costs.

Order accordingly.

CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF THE STATE OF NEW-JERSEY.
OCTOBER TERM, 1844.

ISAAC KERLIN v. JOSEPH E. WEST.

A court of equity will not interfere by injunction, in a case of naked trespass, where there is a full remedy at law.

But for the purpose of quieting a possession, or preventing a multiplicity of actions, or where the value of the inheritance is in jeopardy, or irreparable mischief is threatened, in relation either to mines, quarries or woodland, the court will interfere by injunction, even against a person acting under a claim of right.*

The injury may be irreparable either from the nature of the injury itself, or from the want of responsibility in the person committing it.

INJUNCTION bill, filed on the fifteenth of May, eighteen hundred and forty-four. The bill charges, that the complainant is seized in fee and possessed of a tract of cedar swamp, in the township of Northampton, in the county of Burlington, containing ten acres, which has been owned and possessed by the complainant, and those under whom he claims, for upwards of sixty years, during which time they have exercised acts of ownership over it without interruption or molestation. The bill

* See *West v. Walker*, vol. ii. page 279; *Shreve v. Black et al.*, ante, page 177.

[Kerlin v. West.]

then sets out the plaintiff's title, and the boundaries of the said tract, and further charges, that upwards of fifty years ago the timber growing on the said tract had been cleared off, and a new growth commenced; that the ordinary time for a growth of cedar to acquire maturity is about sixty or seventy years, during all which period the property is unproductive. That the only value of the premises consists in the wood and timber growing thereon, and that if stripped of the timber the injury is irreparable.

That Joseph E. West, under pretence of some claim to the said premises, has entered thereon and commenced cutting the timber; that on the twenty-ninth of April last he advertised the timber growing upon the said tract, for sale at public auction; that although the complainant attended at the time and place specified in the advertisement, and claimed the premises as his own, and forbid the sale; yet the said West, by offering the timber at very low prices, and in small lots, had tempted various persons to become purchasers; that in pursuance of such sales, he had executed in his name, as surviving executor of his father, George West, deceased, an instrument in the nature of a lease, for three years, to each of the purchasers, for the lots by them respectively purchased, with the privilege of cutting and removing the timber and trees growing thereon during said term, and at the expiration thereof, to yield up the possession to the said West, executor as aforesaid; that he has since that time been endeavoring to make sale of the residue of the said tract, and has sold some part thereof on the same terms as above set forth.

That the said West has no claim or title whatever to the said premises, and has never had the possession thereof, nor exercised any act of ownership over the same, either in his own right, or in the right of others under whom he may pretend to claim.

That the said West is engaged with a number of hands, in cutting and clearing off the timber upon a part of the said tract, and threatens entirely to clear off the same; and the complain-

[*Kerlin v. West.*]

ant fears that the purchasers of the said timber, as they purchased with knowledge of the complainant's claim, and under a limited period for cutting the timber, will also cut off the wood and timber by them respectively purchased, unless restrained by injunction.

That the said Joseph E. West is now a resident of the city of New-York; that as the complainant believes, he has no means in the state of New-Jersey with which to respond for the damages he is committing and threatens to commit on the complainant's property, and that he is insolvent in his circumstances; that the purchasers of the said timber, under the belief that the title of West is worthless, have combined and colluded with him to have the whole of the said timber cut off in the name of West, so that he alone shall be answerable in damages to the complainant; but that the timber, when cut off and removed, is to be taken by the said purchasers for their own benefit, and that by virtue of said agreement, West is proceeding to cut off the whole of the timber on the said tract.

That the timber now growing on the said premises, is of thrifty growth and not fully ripe; that the felling of it is doing an irreparable injury to the property; and that for the injury actually committed, the complainant has commenced an action of trespass in the supreme court, and that he intends to prosecute the same to final judgment, and to establish his title to the premises by the judgment of a court of law.

The bill prays that an injunction may issue to restrain the defendants from cutting, felling or working up any of the timber, wood or logs growing, lying or being on the said premises, or from removing the same, or from felling or disposing of any part thereof, or from executing any deed, lease or other assurance therefor, or from committing any waste, spoil or destruction on the said premises. On filing the bill, an injunction was issued as prayed for.

The answer of the defendants, filed on the first of June, eighteen hundred and forty-four, admits the alleged acts of cutting charged in the bill; but denies the title and possession of

[*Kerlin v. West.*]

the complainant to the tract on which the alleged trespasses were committed ; alleges that the title and the possession of the said premises have been in West, and those under whom he claims, for a period of one hundred and twenty-one years ; denies that the defendants have cut off, or intend to cut off the whole of the timber ; but alleges that they are cutting off, and intend to cut off the burnt, dead and decayed timber only ; denies that the injury is irreparable ; denies the insolvency or inability of West to respond in damages for the alleged injuries to the complainant ; denies the collusion or secret understanding charged in the bill, by which all liability for damages was to be thrown upon West ; and denies all fraud and unlawful combination. The answer is joint and several, and in regard to its material allegations is made by West alone, the other defendants alleging that they are unacquainted with the facts and unable to answer touching the same.

The cause was argued at July term, eighteen hundred and forty-four, upon motion to dissolve the injunction.

J. H. Sloan and H. W. Green, for defendants, in support of the motion.

Moffett and Vroom, contra.

THE CHANCELLOR. The first question raised by the bill is, whether an injunction should issue to restrain a person acting under claim of right to premises, from committing trespass thereon.

From a careful examination of the authorities upon the point, I am satisfied that the court of chancery should not interfere in a case of naked trespass, where there is a full remedy at law. Yet where the circumstances of the case are so peculiar, as to bring it under the head of quieting a possession, or preventing a multiplicity of actions, or to put the value of the inheritance in jeopardy, or to threaten irreparable mischief, whether these circumstances relate to mines, quarries or woodland, this court will interfere. 6 *John. C. R.* 497 ; 7 *John. C. R.* 333.

[Kerlin v. West.]

The injury may be irreparable, either from the nature of the injury itself, or from the want of responsibility in the person committing it. *Hurt v. Mayor of Albany*, 3 Paige, 214: *Smallman v. Onions*, 3 Brown, C. R. 623.

The embarrassment which is felt by the courts upon this subject arises, not so much from the want of a clear perception of the principle, as from the difficulty of its application to the ever varying cases that are continually arising. In applying it to woodland, particularly, it is not always easy to discriminate between the mere trespass, and the irreparable mischief, which may destroy the inheritance, or jeopard its value. That being done, the case is clear.

The charge of insolvency, if relied upon as a ground of equity, must be clearly and distinctly made out, and will be acted upon with great caution. In this case, the bill charges threats to cut off the whole of the timber growing upon a cedar swamp, where, by the natural growth, it could not be replaced in less than two, perhaps, three lives. If such threats were made and should be executed, the value of the inheritance must be put in jeopardy, perhaps destroyed, at least, the present value of the premises would be lost, and in this view the injunction was granted.

But the defendants, by their answer, deny the whole equity of the bill. They deny that the premises, on which the alleged mischief has been done, are within, or upon any part of those described in the complainant's title, as set forth in the bill. They deny any threats to cut off the whole timber, and the cutting of any, except of the dead timber, destroyed by fire, and two or three trees partly dead, and any intention of cutting other than the dead timber, and consequently, deny the irreparable injury charged. Upon this answer, the injunction must be dissolved, with costs.

Order accordingly.

DAVID H. TICHENOR v. ROBERT DODD.

The purchaser of a mere equity of redemption purchases a right, and does not assume an obligation to redeem. He may at his pleasure give up the mortgaged premises in satisfaction of the incumbrance.

He is liable to the extent of the value of the premises, and not beyond it.

But if by the terms of the sale the mortgage money is to be taken as a part of the consideration, equity raises upon the conscience of the purchaser an obligation to indemnify the mortgagor against the mortgage debt.

And if the debt be afterwards paid by the mortgagor, equity will compel the purchaser to refund the money so paid.

BILL for discovery and relief. Hearing upon bill, answer, replication and proofs.

Hayes and Vroom, for complainant.

W. M. Scudder, for defendant.

Cases cited by complainant's counsel. *Stevenson v. Black, Saxton*, 338; *Drake v. Bray*, 2 *Hal. Dig.* 631; *Tweddell v. Tweddell*, 2 *Brown's C. R.* 152; *Waring v. Ward*, 7 *Vesey*, 337; *Hartshorne v. Hartshorne*, 1 *Green's Chan.* 349; *Tice v. Annin*, 2 *John. C. R.* 125; *Weymouth v. Boyer*, 1 *Vesey*, 424; 2 *Caine's Cases in Error*, 40, 41; 3 *Peters*, 215; *Livingston v. Livingston*, 4 *John. C. R.* 290; *Sugdon on Vendors*, 304.

Cases cited by defendant's counsel. 1 *Chitty's Gen. Pr.* 858; 2 *Story's Eq.* 794; *Saxton*, 338, 84; 1 *Green's Chan.* 467, 475, 6; *Ibid.*, 267, 275; 2 *Story's Eq.* 108; *Saxton*, 15; *Stevenson v. Black, Saxton*, 345; 1 *Story's Eq.* 74, 259, 9; *Baker v. Biddle*, 1 *Bald.* 408; 8 *Cond. Eng. Chan.* 430; 12 *Cooper's Cases*, 179, 743; *Price v. Smith*, 1 *Green's Chan.* 519; *Eq. Drafts.* 619; 3 *Paige*, 313; 3 *Con. Eng. Chan.* 312; 3 *Moore and Scott*, 561; *Cumberland v. Coddington*, 3 *John. C. R.* 229; *Butler v. Butler*, 5 *Vesey*, 534, 8.

[Tichenor v. Dodd.]

THE CHANCELLOR. The complainant, by his deed, dated the twenty-fourth September, eighteen hundred and thirty-five, conveyed to the defendant, Dodd, certain lots of land in the city of Newark, for the consideration of seven hundred and fifty dollars. At the end of the description of the premises, follows this clause, "The above lots are conveyed subject to the payment of a certain mortgage thereon, given by the said David H. Tichenor to Oliver S. Halsted, James Dawes and Enoch Bolles, for five hundred and twenty-five dollars and thirty cents, which said mortgage, or the amount thereof, is computed as so much of the consideration to be paid to the said David H. Tichenor." Dodd paid Tichenor the amount of purchase money over and above the amount of said mortgage, and on the twenty-ninth of the same month of September, by deed conveyed the lots to one Abraham Hutchins, for the consideration of eight hundred and forty dollars, and inserted in the deed a clause respecting the mortgage, precisely like that contained in Tichenor's deed to him.

The bond and mortgage were afterwards assigned to William Rankin, who filed his bill in this court to foreclose the same, and obtained a decree thereon, under which the premises were sold for the sum of one hundred and eighty dollars, leaving a large balance due.

William Rankin then assigned the bond to James H. Tichenor, who called upon the complainant for the balance due on the bond. The complainant referred James H. Tichenor to Robert Dodd for payment, but he refusing, the complainant paid the amount due, and now files his bill to recover the same of Dodd.

The first proposition of the counsel of the complainant is, that the purchaser of the equity of redemption, takes it subject to the incumbrance, and is bound to indemnify the mortgagor; that he takes it upon his personal responsibility to pay the incumbrance.

If the counsel means to insist that the purchaser is bound beyond the extent of the value of the premises, his proposition is

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too broad to be maintained. The purchaser of a mere equity of redemption, purchases a right and does not assume an obligation to redeem. He may at his pleasure, give up the mortgaged premises in satisfaction of the incumbrance.

If he would retain and enjoy the premises, then he must pay off the incumbrance, and unite the legal title with his equitable interest. He may therefore safely be said to be liable to the extent of the value of the premises, and not beyond it. He takes them, it is true, *cum onere*, but may relinquish them *cum onere*.

To make him personally liable for the amount of the incumbrances, would greatly embarrass, and frequently prevent the sale of an equity of redemption. It would be contrary to the general understanding and daily practice upon the subject, and greatly prejudice the interest of the tenant of an equity of redemption.

In *Tweddell v. Tweddell*, 2 Brown's C R. 154, the leading case relied upon by the counsel, lord Thurlow uses language, which at first view might seem to sustain the proposition contended for, in its broadest sense; yet upon looking at the state of the case, it will be seen that the bill was filed by the devisee, against the personal representatives, and next of kin of the testator, who had covenanted to indemnify the mortgagor, and expressly charged the land devised with the payment of all his just debts and legacies.

If the lord chancellor meant to be understood as saying that this was a liability beyond the value of the premises, and without respect to the covenant and the devise, then his opinion is a mere dictum, for that question was not necessarily raised by the case.

Lord Eldon, in *Waring v. Ward*, 7 Vesey, 338, in commenting upon this opinion of lord Thurlow, regards it as an authority the other way, and says, "Whether lord Thurlow was right or ill-founded in the opinion, that upon the whole either the agreement at first, or the deed executing it, the contract was for an equity of redemption, and nothing more, res-

[Tiehenor v. Dodd.]

soning upon the facts ; yet the case is a clear authority that if he decided the fact right, such a contract for a mere equity of redemption, will not make the mortgage debt, which is to remain an incumbrance upon the estate, a debt of the person buying under those circumstances ; for in his hands it is a debt of the estate—a mortgage interest between his representatives.”

The case of *Tweddell v. Tweddell*, cannot be relied upon as sustaining the doctrine proposed.

In *Waring v. Ward*, the liability of the purchaser is placed expressly upon the ground of his taking possession and receiving the profits, and is entirely consistent with his discharge upon yielding up the possession and profits.

In *Drake v. Bray*, decided in July term, eighteen hundred and twenty, chancellor Williamson quotes the language of lord Eldon in *Waring v. Ward*, and he remarks, if the purchaser purchases nothing more than the pure equity of redemption, and takes the estate subject to the charge of the mortgage, he must be bound in conscience to indemnify the mortgagor against the payment of the debt. By his purchase he becomes a debtor in respect to the bond, and must discharge the incumbrance, or waive the benefit of the purchase.

In *Stevenson and Woodruff v. Black, Saxton*, 342, the principle of the case of *Waring v. Ward* and *Tweddell v. Tweddell* is recognized ; and the chancellor there cannot be supposed to have meant to charge the purchaser beyond the value of the land ; which value, if the purchaser retain the land, will be equal to the whole amount of the incumbrance.

Such seems to have been the view of the court in *Hartshorne v. Hartshorne*, 1 *Green's Chan.* 358, where this point was not directly up.

But the case does not rest upon the ground of the defendant being a mere purchaser of an equity of redemption. By the terms of the deed, the mortgage money was to be taken as a part of the consideration ; and hence, the second proposition of the counsel, that under such circumstances equity raises upon

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the conscience of the purchaser an obligation to indemnify the mortgagor, is correct.

All the authorities in which the point has been considered, seem clearly so to determine, and it is in accordance with sound justice.

The purchaser agrees to pay a sum of money for the land; but a part of that sum is to be applied to the discharge of the mortgage. Had he paid the whole sum to the mortgagee, he would have had the means with which to pay the mortgage. If he withhold the money till the premises are sold away from him, he has no ground of complaint if the mortgagor asks him to pay the amount remaining due.

It is not necessary to determine the legal effect of the recital in the deed. The admissions of the answer fully show the facts of the case.

The complainant is clearly entitled to be indemnified against the amount due on the mortgage, and to have refunded to him the sum of money he was compelled to pay.

His remedy may possibly be by suit at law, as the counsel for the defendant contends; but it is at least doubtful whether he could sustain an action at law, even if he could prove all the facts admitted by the answer. He is therefore properly before this court, and entitled to the relief sought.

Let there be a reference to ascertain the amount justly paid by the complainant.

Order accordingly.

NATHAN BOLLES v. STEPHEN WADE et al.

If a bond and mortgage are paid by the tenant of the equity of redemption, they are discharged as to all subsequent incumbrances.

The tenant of the equity of redemption, by purchasing the mortgage debt, thereby extinguishes the incumbrance on his land.

And if the bond and mortgage so paid by the owner of the equity of redemption, be assigned to a third party at his request, they acquire by such as-

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assignment no greater efficacy than they would have had if delivered directly to the owner of the equity of redemption.

Such assignee could not have enforced the payment of the debt against the owner of the equity of redemption, nor could he have claimed priority against other incumbrances upon the same premises.

If such assignee assign the bond and mortgage to a third party at the request and for the benefit of the owner of the equity of redemption, as against him the lien of the second assignee is good. The mortgage, as against him, acquired new life on its transfer, but it cannot be restored to its lost priority.

The mortgage being but the accessory, when the bond is paid the mortgage is discharged.

The assignee of a bond and mortgage can acquire by virtue of the assignment no greater interest than was held by the assignor; all the equities affecting the assignor pass with the assignment to and against the assignee.

R. Vanarsdale, for the complainant, cited *Garwood v. Administrators of Eldridge*, 1 *Green's Chan.* 145.

J. J. Chetwood, for the defendant, T. Pierson, cited *Brown v. Stead*, 7 *Con. Eng. Chan.* 524; *Millspaugh v. McBride*, 7 *Paige*, 509; *Starr v. Ellis*, 6 *John. Chan.* 393; *James v. Johnson*, *Ibid*, 423; *Stevenson v. Black, Saxton*, 338.

THE CHANCELLOR. On the sixth of May, eighteen hundred and thirty-six, Stephen Wade, one of the defendants, purchased of Elisha W. Goble a lot of land and premises situated in the city of Newark, and to secure a part of the purchase money, executed to Goble his bond and mortgage, which were subsequently assigned to Nathan Bolles, the complainant, who now files his bill of foreclosure thereon.

At the time Wade purchased the premises, they were charged with three several mortgages, one of which was executed by Goble to Frederick W. Smith for eight hundred dollars, and was assigned to the Mechanics' Fire Insurance Company, at Newark.

While the insurance company held this mortgage, and Wade held the equity of redemption in the premises, the company became indebted to Wade upon a policy of insurance, for a

[*Bolles v. Wade et al.*]

as sustained by fire, and a settlement was made between them, in which Wade discharged the mortgage by allowing a credit to the amount of the loss by fire, and paying the balance.

The mortgage was not cancelled, but at the request of Wade was assigned to his brother, Job Wade.

Subsequently, Stephen Wade borrowed money of Theophilus Pierson, and to secure its payment, directed his brother Job to transfer the bond and mortgage to Pierson, who now holds the same, and is therefore made a party to the bill.

On behalf of Pierson, it is insisted that he being without notice of the transaction between Stephen Wade, Job Wade and the insurance company, and having taken the bond and mortgage for its full value and in good faith, is entitled to have priority, according to the dates of the several incumbrances.

The bond and mortgage held by Theophilus Pierson, having been paid with the money of Stephen Wade, the tenant of the equity of redemption, were discharged as to all subsequent incumbrances. He purchased the debt and thereby extinguished the incumbrance on his land: *Tice v. Annin*, 2 *John. Chan.* 129; *Hartshorne v. Hartshorne*, 1 *Green's Chan.* 349.

The assignment to Job Wade, gave no greater efficacy to the bond and mortgage than they would have acquired by a delivery direct to Stephen Wade. Job Wade could not have enforced the payment of them against Stephen, nor could he claim priority against the other incumbrances.

The debt (of which the bond is the evidence) is the principal, the mortgage is the accessory. When the bond is paid, the mortgage is discharged: *Jackson v. Blodget*, 5 *Cowen*, 202; *Stevenson and Woodruff v. Black, Saxton*, 343.

The defendant, Pierson, as assignee, could acquire by virtue of the assignment no greater interest than was held by the assignor. All the equities existing against the assignor passed with the assignment to and against the assignee, consequently,

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as to the subsequent incumbrancers, he stood precisely in the position of Job Wade.

As against Stephen Wade, at whose request and for whose benefit the assignment was made, the lien of Pierson is good.

The mortgage as against him, acquired new life on its transfer to Pierson, but it cannot be restored to its lost priority.

It must be postponed to the mortgage of the complainant, and also to the lien of the other incumbrances, unless they have lost their priority by something not apparent here.

Let the matter be referred to a master to settle the priorities in accordance with these views, and all further equities be reserved till the coming in of the report.

WILLIAM R. JAKES v. HENRY ESLER, JEREMIAH S.
BRUCE and OLIVER VANDERBILT.

The purchaser of real estate by deed of warranty, has a right to relief in equity against the vendor, who seeks to enforce the payment of a bond and mortgage given for the purchase money, until a suit actually brought to recover the premises by a person claiming them by a paramount title, shall have been determined.

And the rule applies, whether the purchaser had notice of the outstanding claim or not.

And the assignee of the bond and mortgage takes them subject to the same equity.

The ground upon which the equity existing between the obligor and obligee passes to the assignee, is, that the assignee may, before taking the assignment, learn from the obligor whether there be any set off or objection to the bond.

If the obligor mislead the assignee, or gives assurance of payment notwithstanding the existence of the suit for the premises, he has waived his equitable right to withhold the money until the suits are determined.

THIS was a motion to dissolve an injunction, granted upon the filing of the complainant's bill, to restrain the defendants,

CASES IN CHANCELLERY.

[*Jaques v. Esler et al.*]

Esler and Bruce, from proceeding at law to recover a bond given by the complainant. The material facts of the case, and the grounds relied on for a dissolution of the injunction, are stated in the chancellor's opinion.

Ryall, for the defendants, Esler and Bruce, in support of the motion.

J. F. Randolph, contra.

THE CHANCELLOR. The complainant, in his bill, alleges that on or about the twelfth November, eighteen hundred and forty-one, he purchased a lot of land at Key Port, in the county of Monmouth, of the defendant, Vanderbilt, who conveyed to him by deed, with the usual covenants of seizin and warranty; and to secure a part of the purchase money, executed a bond and mortgage upon the premises, and that he afterwards paid to Vanderbilt one of the installments of the bond.

That an action of ejectment has been brought against him, by persons claiming the premises by a paramount title; and that a bill in equity has also been filed against him by the same persons, to set aside a conveyance, under which Vanderbilt claimed the premises.

That the defendants, Esler and Bruce, became assignees of the bond and mortgage after he had informed them of the consideration thereof, and that he would not pay the amount due thereon, unless he were indemnified against the outstanding claim to the land; and that they have prosecuted him at law upon the bond, and filed a bill in equity to foreclose the mortgage.

Upon this statement of facts, an injunction was very properly granted, to restrain the defendants from proceeding in their suits upon the bond and mortgage. For it is well settled, that the purchaser of real estate by deed of warranty, has a right to relief in equity against the vendor, who seeks to enforce the payment of a bond and mortgage, given for the purchase money,

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until a suit actually brought to recover the premises, by a person claiming them by paramount title shall have been determined. He is not obliged to look merely to the covenants in the deed; he is not to be driven to such circuity of action, nor to rely upon that as his only security. The fund in his hands is a security, of which it would be inequitable to deprive him.

And this rule applies whether the purchaser had notice of the outstanding claim or not. Indeed, in practice, it not unfrequently happens, that notice of such claim induces the purchaser to require a covenant against it. *Tourville v. Naish*, 3 P. Wms. 306; *Johnson et al. v. Gere*, 2 John. C. R. 546; *Shannon v. Marselis et al.*, *Saxton*, 425; *Van Waggoner v. McEwen et al.*, 1 *Green's C. R.* 412.

It is equally well settled, that the assignee of a bond and mortgage takes it subject to the same equity that existed in the hands of the original mortgagee.

This is the rule, both at law and in equity. See *Barrow v. Bisham*, 6 Hals. 116, and the cases there cited by justice Ford, who delivered the opinion of the court. Also, *Shannon v. Marselis et al.*, *Saxton*, 425, and the cases there cited by chancellor Vroom.

But the defendants, Esler and Bruce, upon whom is the gravamen of the charge, by their answer wholly deny this equity.

They deny that the complainant, before the assignment of the bond and mortgage, told them that he would not pay the money due on them, unless indemnified against the outstanding claims. On the contrary, they allege that one of them, before taking the assignment, called upon the complainant to know if there were any objection to the payment, and that they wished to know before taking the assignment, and that they would not take it unless the money were safe, and would be paid when due. And that the reply of the complainant was direct, that they had better take the assignment, that he would pay the bond and mortgage when they became due, in whose hands soever they might be.

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And they say that in consequence of this promise, the defendants, Esler and Bruce, took the assignment of the bond and mortgage for a full and valuable consideration, by them allowed to Vanderbilt in the settlement of their account with him. That they afterwards, and after the last payment became due, called upon the complainant for the money, and were then for the first time, informed by him, that difficulties existed about the title to the land, and that he had not been able to get money to pay off the bond and mortgage, but that he would pay them off if he could borrow the money. Soon afterwards, one of the defendants called upon the complainant at Key Port, and was there informed by him that in consequence of the suits pending for the land, the person of whom he expected to borrow the money, would not lend it, and the complainant, then, for the first time, told the defendant that unless he was indemnified by Vanderbilt against those suits, he would not pay the money, and the defendant replied, that if he had known that such difficulties would have been made, they would have had nothing to do with the bond and mortgage, but would have made some other arrangement with Vanderbilt.

The ground upon which the equity existing between the obligor and obligee passes to the assignee is, that the assignee may, before taking the assignment, go to the obligor and learn whether there is any set off or objection to the bond.

In this case, the assignees have used all due diligence; they made the proper inquiry, and were governed by the answer.

If the obligor misled them, or gave assurance of payment, notwithstanding the existence of the suit for the premises, he has waived his equitable right to withhold the money until the suits are determined.

He has removed the equity himself, and should not seek to have it restored. He made a promise upon which the defendants relied, and he should not complain that they now ask him to fulfill it.

It is true, the allegations of the bill and those of the answer are directly at variance; but the allegations of the answer are

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responsive to the bill, and on the motion to dissolve the injunction, it must prevail.

Let the injunction be dissolved, with costs.

Order accordingly.

THE EXECUTORS OF JOHN POWERS, deceased, v. THE ADMINISTRATOR OF JOHN BUTLER, deceased.

Courts of equity originally interfered to grant relief against judgments at law, on account of the impossibility of obtaining relief at law by new trial, when, under the circumstances, the verdict ought not to conclude the party.

As the courts of law have extended their jurisdiction over the subject, courts of equity have withdrawn theirs from it.

It is now the settled doctrine of the English court of chancery, not to relieve against a judgment at law on the ground of its being contrary to equity, unless the party aggrieved was ignorant of the fact relied on as the ground of relief pending the suit, or it could not have been received as a defence.

If facts exist which render it inequitable in the plaintiff at law to enforce his judgment, and those facts could not avail the defendant, either by reason of the rigid rules of law, or by fraud or accident, or by reason of their not being known to him in time for that purpose, without any fraud or negligence on his part, equity will restrain the plaintiff by perpetual injunction from proceeding upon his judgment, or will otherwise relieve against it.

THE principal design of the bill filed in this cause, was to restrain the defendant by a perpetual injunction, from proceeding at law upon a judgment recovered against the complainants, upon a sealed bill, given by their testator, and to avoid the obligation as fraudulent.

John Butler, the defendant's intestate, died on the ninth of October, eighteen hundred and thirty-seven; among other effects contained in the inventory of his estate, was a sealed bill for one thousand five hundred dollars, made by John Powers, bearing date on the twenty-fourth of June, eighteen hundred and thirty-seven, and payable six months after date, with interest. Early in the year eighteen hundred and thirty-nine, Powers died, and probate of his will was granted to the complain-

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ants on the eighth of February, in that year. At August term, eighteen hundred and thirty-nine, a suit was commenced upon the obligation by Butler's administrator, against the executors of Powers, in the common pleas of the county of Warren. The defendants pleaded, first, *non est factum*; second, *duress per minas*. At February term, eighteen hundred and forty, a trial was had and judgment rendered in favor of the plaintiff for one thousand seven hundred and thirty-nine dollars and fifty cents of debt, the amount due on the obligation, with costs of suit. At the same term, a rule was taken to show cause why the verdict should not be set aside, which was argued and discharged at August term, eighteen hundred and forty. A writ of error was thereupon brought and the judgment removed into the supreme court.

Pending the writ of error, on the ninth of August, eighteen hundred and forty-one, the complainants filed their bill in this cause. On filing the bill a temporary injunction issued.

On the twenty-eighth of September, eighteen hundred and forty-one, the defendant filed his answer; and at the October term following, moved to dissolve the injunction. The motion was denied; the amount of the judgment having been deposited, and the material facts contained in the answer, denying the equity of the bill, not being within the personal knowledge of the defendant.

The cause came on for final hearing at January term, eighteen hundred and forty-four, upon bill, answer, replication and proofs.

I. H. Williamson and Vroom, for complainants.

H. W. Green, for defendant.

Cases cited by complainants' counsel, in support of the jurisdiction of the court: 2 *Vern.* 146; *Prec. in Chan.* 233; 3 *Eq. Cas.* Ab. 159; 2 *P. W.* 424; 1 *Vesey, sen.* 289; 2 *Vesey*, 135; 2 *Atkyns*, 190; 3 *P. W.* 394; 1 *Sch. and Lef.* 201; 1

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Chan. 49; 3 *Ibid*, 275; 6 *Ibid*, 87; 2 *Wash.* 255; 2 312; 3 *Dess.* 300, 322; 2 *John. Chan.* 202; 5 *Paige*, 1 *Paige*, 630; 8 *Vesey*, 283; 18 *Vesey*, 483; 13 *Vesey*, 1 *Vesey*, 219; 14 *John.* 501; 1 *Story's Eq.* 199, *sec.* 2 *Vesey, sen.* 155; 14 *John.* 510; 13 *Vesey*, 51; 1 *Vern.* 19; 18 *Vesey*, 12; 1 *Vesey and B.* 195; 1 *Hen. Mun.* 69; 2 *Vesey, sen.* 627; 2 *Vesey*, 292; 2 *Atkyns*, 1 *Story's Eq. sec.* 230; 1 *Swans.* 137; 4 *Dess.* 350; 1, 346, 355; 1 *Story's Eq. sec.* 236.

as cited by the defendant's counsel: 1 *Vern.* 176, *note* 2; *n.* 316; 2 *Vern.* 436; 2 *Atkyns*, 319; 7 *D. and E.* 3 *Price*, 341; 1 *John. Chan.* 96, 323; 6 *John. Chan.* 2 *Wash.* 258, 344; 1 *Rand.* 478; 2 *Munf.* 1; 3 . 212.

CHANCELLOR. John Lake, administrator of John deceased, sued Garret Roach and John McCauley, exec- &c. of John Powers, deceased, in the court of common of the county of Warren, upon a sealed bill, purporting re been made by the testator, and dated June twenty- eighteen hundred and thirty-seven, for one thousand undred dollars, payable to John Butler, his executor, ad- rator or assigns, six months after date, with interest. his suit the executors of Powers pleaded *non est factum*, *uress per minas*.

the term of February, eighteen hundred and forty, the was tried and a verdict rendered. Judgment *nisi* enter- favor of the plaintiffs for the amount of principal and in- due on the sealed bill.

able to show cause why the verdict should not be set aside new trial granted, was taken, but after argument, was d, at the term of August, eighteen hundred and forty. ction was then brought in the Warren circuit court, at Roach and McCauley, upon the judgment, suggesting a *tavit*.

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The executors, defendants at law, have filed their bill in this court, to restrain the administrator of Butler from proceeding any further upon the said judgment, or in the action brought upon it, and from any other proceeding at law touching the said matter.

The bill of complaint charges that the sealed bill was obtained fraudulently and without any consideration, and when the said John Powers was intoxicated, and not capable of knowing what he did ; and that a certain deed of conveyance of a farm, from Powers to Butler, was also obtained fraudulently, and without any consideration, when Powers was intoxicated and incapable of transacting business or of disposing of his property, and by threats of personal violence, and through fears of bodily harm ; and that Butler had extorted money from Powers, by threats of violence, and had purloined his books of account containing charges against himself, and divers papers, including several promissory notes. And it is further alleged, that at the time of the trial, the complainants were wholly ignorant of the matter so charged, and have since discovered new and material evidence respecting the same. And the prayer is for relief against the judgment, or any proceeding thereon ; and for an account of the notes purloined, money advanced, &c. The cause is now on final hearing, upon the bill, answer, replication and proofs, the amount of the judgment having been deposited here.

The first question is, whether this court should interfere in this case and restrain the party from enforcing his judgment at law ?

New trials were granted by courts of law at a very early date, as early, at least, as the year sixteen hundred and fifty-five, and even before that time, as appears from *Slade's case*, *Style*, 138, and by a remark of Glynn, chief justice, in *Wood v. Gunston*, *Style*, 446 ; although no report is found further back, as the old books do not contain reports of the determinations made by the court upon motions : *Bright, Ex'r, v. Eynon*, 1 *Burr.* 394.

But for a long time the rules for granting new trials were held

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with a strictness so intolerable, that parties were driven into a court of equity, to have, in effect, a new trial at law upon a mere legal question, because the verdict, under all circumstances, ought not to conclude: *Ibid*, 394, 5.

Subsequently, these rules have been relaxed, until the jurisdiction has become well established, and is frequently exercised at law, upon equitable as well as legal grounds; so that in almost every case where the court are satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case, they will grant a new trial: 3 *Black. Com.* 392; 6 *T. R.* 638; 2 *Arch. Pr.* 222; *Hutchinson v. Coleman*, 5 *Hals.* 74.

Upon an examination of the numerous authorities, most of which have been referred to by the counsel in this cause, it will be seen, that as the courts of law have extended their jurisdiction over this subject, the courts of equity have withdrawn their jurisdiction from it. And this is in accordance with the general principle, that where a court of law can furnish an adequate remedy, a court of equity will not interfere.

Hence it has become the settled doctrine of the English chancery, not to relieve against a judgment at law on the ground of its being contrary to equity, unless the party aggrieved was ignorant of the fact in question pending the suit, or it could not have been received as a defence: *Williams v. Lee*, 3 *Atkyns*, 223.

In *Bateman v. Willoe*, 1 *Sch. and Lef.* 201, lord Redesdale said, "There are cases cognizable at law, and also in equity, and of which cognizance cannot be effectually taken at law, and therefore equity does sometimes interfere; so where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something by means of which he has an unconscientious advantage at law, which equity will either put out of the way or restrain him from using; but without circumstances of that kind I do not know that equity ever does interfere to grant a new trial of a matter which has already been

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discussed there, and over which the courts of law can have full jurisdiction."

The same learned jurist adds, "It is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize this court to interfere; because, if a matter has already been investigated in a court of justice according to the common and ordinary rules of investigation, a court of equity cannot take upon itself to enter into it again."

This doctrine has been fully recognized in the United States. In the *Marine Insurance Co. v. Hodgson*, 7 *Crunch*, 336, chief justice Marshall said, Without attempting to draw any precise line to which courts of equity will advance and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said, that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law but was prevented by fraud or accident, unmixed with any fraud or negligence in himself or his agent, will justify an application to a court of chancery.

In *Lansing v. Eddy*, 1 *John. Chan. R.* 51, chancellor Kent adopted the same rule. And in *Simpson v. Hart*, *Ibid*, 98, 9, he reiterates it more at length, and cites 1 *Johns. Cases*, 436, 6 *T. R.* 471, and 1 *Sch. and Lef.* 201.

The decree in *Simson v. Hart* was reversed in the court of errors, (see 14 *John. R.* 77,) but Spencer, chief justice, who delivered the opinion of the majority of the court, approved of the principles cited by chancellor Kent, but denied their applicability to that case. See also *Duncan v. Lyon*, 3 *John. C. R.* 356, 7; *Foster v. Wood*, 6 *John. C. R.* 90; *Floyd v. Jayne*, *Ibid*, 482; *Norton v. Woods*, 5 *Paige*, 249; *Winthrop et al. v. Loubat*, 3 *Dess.* 324, 5; *Noland v. Cromwell*, 4 *Munf.* 155; and as to the diligence required, see *Glover v. Hedges*, *Saxton*, 119.

These principles, in my judgment, are in accordance with equity and sound sense, and should govern this case.

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If, therefore, it shall appear that facts exist which render it inequitable in the plaintiff at law to enforce his judgment, and that those facts could not avail the defendants, either by reason of the rigid rules of law, or by fraud or accident, or by reason of their being unknown to them in time for that purpose, without any fraud or negligence on their part, then the plaintiff must be restrained, otherwise not.

If the sealed bill were obtained by fraud and imposition, the judgment upon it cannot in conscience be enforced.

Nor if it were procured by threats of personal violence and injury, or under the influence of extreme terror or of apprehension, although short of duress. In such case, the party is not a free agent, and the instrument is not his deed. He is said to stand *in vinculis*. And the rule of equity is, where a party is not a free agent, and is not equal to protecting himself, the court will protect him: 2 *Story's Eq.* (3d edition,) 239, and cases cited in note 2.

But if the evidence of the fraud, or threats of violence, or undue influence were known, or with due diligence might have been known to the party defendants in time to be used at law, and were such as the court ought to have taken notice of, then this court cannot interfere, even if the judgment is against conscience. In such case the party must seek redress, if he is entitled to any, in a court of appellate jurisdiction.

Let us examine the facts of the case, and inquire, first, whether the judgment is against conscience; and if so, then whether it is a case in which this court should interfere.

James McTier, the scrivener and subscribing witness to the sealed bill, testifies, that the old man (Powers) had spoken to him before about making a bond to Butler for one thousand dollars, but that at the time it was drawn he directed it to be made for fifteen hundred dollars; that he saw him make his mark to it, and that he, McTier, subscribed his name as a witness to it. He does not remember of reading it over to him, nor of the old man's putting his hand upon the seal; but being accustomed to transact such business, and to read over such

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instruments, before their execution, he thinks he read this over to Powers; and seeing the seal to it, he presumes that Powers must have acknowledged it to be his hand and seal for the purposes therein mentioned. That the old man made his mark instead of signing his name, because of the defect of his eyesight; and that he said he could not see through any glasses he had ever seen. And he thinks the bond was delivered to Butler or his wife. That the old man at the time seemed rational and willing that the writings should be made, although he was too old to look over them.

This is the evidence of the instrumental witness, and upon it the jury had a right to find the due execution of the bond.

Unless something further can be shown, the judgment cannot be considered as against conscience.

Upon further examination, it appears that the deed was drawn and executed on the same day with the bond, but not on the day it bears date.

He says the deed was read over to Powers before execution, and that he made his mark to it and acknowledged it to be his hand and seal, and that he (McTier) and Thomas Butler signed their names as witnesses to it.

The subject of the execution of the deed is introduced into the complainant's bill, not for the purpose of setting aside the deed, for that will devolve upon the heirs or creditors of Powers, but to enable the complainants to resort to other testimony respecting it, and thereby more fully to develop the alleged fraud in procuring the bond.

With this rule, Abraham Stiers, one of subscribing witnesses to the deed is called, and he says that he was at Butler's, where Powers then lived, the day before the deed was executed; that something was said about signing the deed, and Powers said he would not sign it till he got some papers which Butler had of his. He thought the old man not calculated to do business altogether correct; but could not say he was or was not. He thought him incapacitated by drinking and old age, and had understood he had been drinking "a spell back, pretty hard,"

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ut was sober at that time, for any thing he knew ; that Butler spoke to him middling sharp, and he thought he showed some fear of Butler, but that Butler spoke to him more sharply on that day than on the day the deed was executed. He says he was there the next day in the morning, but not on the day the deed bore date, that Lake was there also, and read over the deed to Powers, and Powers said it was right, and that he then made his mark to it, and Lake and he witnessed it.

On the day before the execution of the deed, Ziba Osman was present at the time Stiers speaks of, and before Stiers came ; he says he was sent for, and Powers told him he wanted to see him, that he was going to make a deed to Butler for that place ; that Butler had his papers, and if he would not give them up, he would never sign the deed ; and added, " If he misses this chance, he may never have the opportunity again ; I am an old man, with one foot in the grave and the other trembling over , and I may perhaps die before to-morrow morning." He says Butler was drunk, and used harsh language to Powers, and told him to " shut up his shell." That Powers was sober, and so far from being terrified by Butler's language, he said he was a saucy impudent puppy, and rather made a little threat with his cane if he did not hold his tongue.

This is the language and conduct of a sober rational man, and if true, shows that Powers contemplated the execution of the deed, but had a good reason for not doing so.

Mrs. Butler then went up stairs and brought down some papers, among which were two deeds, one from Lake to Powers, and the other the deed he was going to give to Butler, two old wills and other papers that the witness did not particularly notice. The deed to Butler was read over by Osman, and Powers appeared satisfied ; and it would seem that Powers was then willing to sign the deed, but Osman recommended him to wait till next morning. He did so, and on the next morning the deed was executed, as before stated. Other conversations between the witness and Powers at this time, show intelligence and memory, and a sound and disposing mind.

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This witness says that McTier's name was not subscribed to the deed at the time he read it to Powers; he is sure of it, and he thinks Butler's name was not there. That he understood from some of the family, that McTier went down the same evening and witnessed them.

If this statement is correct, it goes far to disturb our confidence in McTier, and throws suspicion over his whole conduct. But it will not do to condemn a witness upon the declarations of third persons, and they perhaps interested to make them; and then it becomes a question who is right about the signatures of the subscribing witnesses, McTier or Osman? McTier being the scrivener, accustomed to the transaction of business of this kind, is more likely to have recollected so important a fact as the signing his name as a witness, than Osman to recollect whether it was signed to a paper, which he was merely called upon to read, without having his attention called particularly to that part of it; at least it is safe to say that his testimony upon this point is not overcome by that of Osman.

Nor do I conceive it to be disturbed by the transactions at the time of executing the deed, and the day previously, as narrated by Stiers, and more fully detailed and explained by Osman.

But there are irregularities apparent upon the face of the papers, incongruities in the statement of McTier in relation to them, and which are urged as bearing strong evidence of fraud. He says the deed and bond were drawn and executed on the same day, yet they bear different dates, and the deed executed twice, and was proved before a judge on a day prior to the date of the bond. A blank seems to have been left in the bond for the sum to be secured, although the obligor sat by when it was drawn. There are several erasures in the deed, which under some circumstances would be very natural. Of these and some other similar irregularities, the witness can give no explanation, although an explanation is so very desirable, and would perhaps go so far to sustain his testimony.

But it must be remembered that a period of three and a half years elapsed between the execution of the instruments, and

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giving the testimony; and it is not surprising that many of the particulars of the transaction should have been forgotten. Many things are done too, contrary to the usual course of business, either through the want of skill in the agent, or to satisfy the caprice of the principal. Yet if they are not inconsistent with fair dealing, we cannot regard them as fatal.

Some attempt has been made to impeach the witness, on the ground of intemperance; but whatever may have been his habits, there is no proof of intoxication at the time of drawing these papers. Indeed the penmanship itself, raises a pretty fair presumption to the contrary.

The statements made by him to Mrs. Henderson in eighteen hundred and thirty-nine, that Powers would hold up his hand and say, "look at those little gnats and wafers flying about, &c." may all have been true, and yet they do not impeach the credit of the witness nor the capacity of the grantor. Dr. Gale tells us that in eighteen hundred and thirty-five, the old man's eyesight was defective, so that when he looked at objects suddenly, at a distance, they did not appear right to him; there was an illusion and errors in vision, but when he fixed his eye on an object it appeared right. The same affection increased, might cause the appearances of which he spoke on this and on some other occasions.

But another witness testifies that Powers was intoxicated on the day that McTier says the bond was executed. It may have been so, but on comparing the testimony with that of others, it will be found that this witness came with Van Horn, who had an account to settle with Powers, and came in towards sun down. McTier says the papers were all drawn and executed before Van Horn came in. This does not, consequently, contradict McTier's statement as to the situation or capacity of Powers.

But we are not left to determine the veracity of McTier nor the capacity of Powers upon this evidence alone.

Lake, the defendant, in his answer, denies that the bond and deed, or either of them, were obtained by fraud and imposition,

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or threats of personal violence, or while Powers was in a state of intoxication. He admits that they were given without valuable consideration, but that Powers informed him that the consideration of the deed, and of a certain sealed bill or obligation he had given to Butler, was to make him equal to Francis Longworth, who had married another niece of Powers, and to whom he had advanced about two thousand dollars in cash; and that he had considered the situation of Butler's family, and that it would be unjust for the two children he had by his second wife, to stand back in the division of their father's estate, and see the children of the first wife take the whole; that he was well pleased with the conduct of Butler's second wife, and with her treatment of the children, &c. He further states that he read over the deed to Powers, and informed him of the contents of it, when, in his judgment, he was fully competent to transact any business; that he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed; that he made his mark because he was unable to write his name without great difficulty; and that he did not acknowledge it before a proper officer because he was decrepit and lame, and could not well get into a wagon, but requested him and Stiers to witness it, and they did so.

Now this is stated upon the knowledge of the defendant, and is responsive to the bill, and must be taken as true, unless overcome by competent testimony. He not only gives his opinion of the capacity of Powers, but narrates conversations from which we can judge of it.

In corroboration of his statement, we have the certificate of the proof of the deed before judge Johnson, by Lake, at a time when he had no connexion with these parties.

Judge Johnson also states, that after the proof of the deed, and not long before Butler's death, Powers sent for him and proposed to buy of him a piece of land adjoining the Lake farm, and said he had given that farm to Butler, and he wanted the lot to add to it and to have it conveyed to Butler. They

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agreed upon the price of the land and for the conveyance, but the conveyance was neglected, and Butler soon after died, and it was never made.

He says Powers was sober, and he thought competent to do business, as much so then as when he usually saw him.

If this statement is correct, it shows, at least capacity enough to make a bargain, and continued good will towards Butler. And while in this state of mind, he distinctly recognizes the conveyance of the Lake farm to Butler.

It appears very clearly that Powers had long been an intemperate man, and that after his removal to Butler's, his intemperance increased; that Butler and his wife were also in habits of beastly drunkenness, and when they all drank together, they generally quarrelled, and often had pitched battles, in which the old man usually fared the worst, and was sometimes very badly hurt.

When Butler was drunk, which seems to have been nearly every day, he used abusive and threatening language to the old man; and when the old man was drunk, he seems to have been terrified by it. But I cannot discover in any of the testimony, that Butler, when sober, used such language; or that Powers, when not intoxicated, was ever put in fear by it; or that any violence, or any harsh words were used when both were sober; on the contrary, it appears that at such times they were very friendly, and that up to the time of executing the deed, at least, Powers seems to have regarded Butler's family with great interest, and even just before Butler's death was willing to provide further for them, by adding to the farm already conveyed.

It appears to me, therefore, that the charge of fraud and violence, in procuring the bond and deed, is not sustained by the evidence.

It is clearly shown that the old man had a father's care over Butler and his family, from the time of their arrival in Philadelphia; that he bore with his waywardness and abuse with more than a father's patience, and it is not surprising that entertaining such feelings, he should, upon being reconciled after

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a quarrel, give him almost anything he asked. Such demands did not amount to extortion, nor such treatment to duress or even intimidation.

It must be borne in mind also, that Powers, long before the execution of the papers, had designed not only to provide for Butler, but largely to endow him, and accordingly we find that as early as the winter before Butler moved upon the Lake farm, Powers determined to give him a farm, and proposed to Charles Bartles, esquire, to sell one to Butler, and that he would pay for it, provided the price did not exceed three thousand dollars; and at the time of this proposal, he stated in substance what the defendant says he stated to him, of his intentions and feelings toward the family. And I think it is fairly shown that he entertained these kind feelings and intentions up to the time of executing the bond and deed.

After that, during their revels, in their quarrels, he denied the validity of the bond, and in his will he solemnly declared it void.

It is difficult to reconcile these declarations with his former acts. The increased brutality of the family, after the execution of those instruments, would naturally make him repent his kindness to them; but if I have taken a proper view of the case, his repentance came too late; his declarations, at any rate, cannot absolve the bond.

The evidence that Butler told Powers he need not pay the bond unless he chose to do so, is too vague and indefinite to affect the case. And the alleged declaration of Lake to Smith and Wookon, "that there was a flaw in the bond, and there would be no difficulty about it," even if there were no conflict of testimony, nor denial of it in the answer, ought not otherwise to affect it than to afford the executors some excuse for not being more fully prepared for trial.

His saying there was a flaw in the bond, cannot vitiate or discharge it.

Again. It is charged that certain notes and books of account of Powers were purloined by Butler.

As to the books, there is no satisfactory evidence that any of

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ever came to Butler's hands; the defendant says he never knew of any.

There were three notes which came to his possession. One to Murphy, taken at the vendue, and said to have been sold to him, with other things, for twenty-five cents; one to Seal and Chamberlain, which, according to the testimony of David Chamberlain, Powers had given to him; and one against James Skinner, which Skinner and McTier say Powers also gave to Butler.

Without stopping to inquire into the validity of these gifts, or the evidence of right from the fact of possession, I cannot make the answer of the defendant upon this point, corroborate the testimony of Margaret Lake, that the agents of Powers agreed to make no charge of them, if he would make no charge against Powers for board.

Smith, one of these agents, does not recollect that agreement but he does not pretend to have a distinct recollection of what took place then, and says that he was infirm at the time making his testimony. Without questioning his veracity, it will still be said, that Margaret Lake's testimony on this point has the most weight.

The court, therefore, refuse to direct an account for the notes, or for the money on the books, or for rents or moneys paid, as well because of the want of evidence of the existence of any proper defence herefor, as of a sufficient excuse for not pleading them in answer to the action on the bond.

In this view of the case, it is unnecessary to pursue the inquiry further, as it is obvious that this is not a case in which the court should interfere.

The bill must therefore be dismissed, with costs.

As to the allegation of the insolvency of the estate, I think the money paid into court should remain here until the division of it shall be declared, and the amount of such division paid to the defendants. But if any question shall arise on that point, it can be settled, upon an application for judgment for the money.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY,

JANUARY TERM, 1845.

CLARKSON RUNYON v. The FARMERS AND MECHANICS' BANK OF NEW-BRUNSWICK.

The receivers appointed under the act, entitled, "An act to prevent frauds by incorporated companies," derive their power wholly from the statute. They have no authority which is not conferred by the act.

It is not necessary that the power should be *expressly* conferred. It is sufficient if it can be fairly implied from the general scope of the statute, or as incident to a power expressly given.

The receivers have power to administer oaths to witnesses in matters pending before them, which they are empowered by the statute to hear and determine.

The receivers, in the admission or rejection of testimony, are to be governed by the rules of evidence.

The rules of evidence are generally the same in equity as at law.

H. W. Green, for the claimant.

Vroom, contra.

THE CHANCELLOR. John T. Smith and Company presented to the receivers of the Farmers and Mechanics' Bank of

[*Bunyon v. Farmers and Mechanics' Bank of New-Brunswick.*]

New-Brunswick, a claim against the said bank for the amount of a check for three thousand one hundred dollars, drawn by Joseph F. Randolph and Company upon the Mechanics' Banking Association of New-York, on the sixteenth of October, eighteen hundred and thirty-nine; which the receivers questioned, and, after hearing the testimony of the claimants, refused to allow.

From the determination of the receivers, the claimants appealed to the chancellor, whose duty it is made by the statute of the sixteenth of February, eighteen hundred and twenty-nine, (*Elmer's Dig.* 36, *pl.* 23,) in a summary way to hear and determine the matter complained of.

Upon the argument, it was insisted by the counsel of the appellants, that the receivers have no power to sit in judgment upon the matter in question, nor to administer an oath.

The receivers derive their power wholly from the statute under which they were appointed, and have no authority which is not conferred by it. But this power need not be expressly conferred; if it can be fairly implied from the general scope of the statute, or as incident to a power expressly given, it is sufficient.

The statute is not explicit upon the subject of administering an oath upon the investigation of claims; but it confers the power to hear and determine claims presented to them, and from their determination an appeal to the chancellor is given; and it is difficult to suppose that the legislature intended, that such determination should be made upon the mere allegations of the parties. If not so made, it must be on oath or affirmation, to be administered by the tribunal before which the matter is pending, or other legal evidence.

And I see no reason, upon the ground of interest or of propriety, why this should not be so. A receiver is an indifferent person between the parties: *Wyatt's Prac. Reg.* 355. He should be, and generally is, wholly disinterested in the subject matter of the suit: *Bennet's Master*, 93. He is an officer of the court: *In the matter of Burke*, 1 *Ball. and B.* 74. He is but a crea-

[*Ranyon v. Farmers and Mechanics' Bank of New-Brunswick.*]

ture of the court, (*Edwards on Rec.* 3,) the hand of the court, and is therefore peculiarly qualified to investigate the matter in question, and to ascertain the truth of the allegations.

The claimants had the right to submit to this tribunal, or at their pleasure, to the verdict of a jury, on an issue to be made up between the parties, under the direction of a justice of the supreme court: *Elmer*, 35, *pl.* 19.

But whether this construction of the statute be correct or not, it can have but little influence upon the result of this case. If it be correct, and the proofs and proceedings were *coram non judice*, then the claimants are here without proof of their claim, and must fail.

I am satisfied with the form of proceeding adopted by the receivers, and will proceed to examine the merits of the case. If in so doing it shall appear that the claim is either legal or equitable, I will allow it.

The testimony of Carman F. Randolph, a witness produced on the part of the claimants, was received under objection, on the ground of interest, and in determining the case was rejected by the receivers.

The rules of evidence are generally the same in equity as at law: *Manning v. Lechmere*, 1 *Atk.* 453; *Glynn v. Bank of England*, 2 *Vesey*, *sen.* 41. And questions of the competency and incompetency of witnesses, and other proofs, the same in both courts: 2 *Story's Eq.* 913, *sec.* 1527.

The receivers, in rejecting the testimony of this witness, did rightly, whether they were governed by the rules of law or of equity. He had a present, certain, vested interest in the event of the suit; he was liable to the claimants for the same demand, established by the judgment of a court of law; and if this claim should be allowed, and the whole or any part of it paid out of the assets of the bank, the witness will *pro tanto* be discharged from his liability to the claimants.

Nor can the testimony be admitted upon the ground of the agency of the witness.

The rule which allows an agent, *ex necessitate rei*, to give

[*Ranney v. Farmers and Mechanics' Bank of New-Brunswick.*]

evidence, applies only to agents employed in the ordinary transaction of commerce: *Edmonds v. Lowe, 8 Barn. and Cress. 407*; *15 Eng. Com. Law R. 250.*

The claim then must rest upon the other proof taken in the case. From this it appears, that a twelve month prior to the date of the check, the bank was in the habit of redeeming its bills in the city of New-York, and by its president, employed the claimants as their redeeming agents, and was to allow them for their trouble one quarter of one per cent, and to deposite with them five hundred dollars or one thousand dollars, and to redeem the bills daily.

A deposit of one thousand dollars, which was considered sufficient to cover the amount redeemed in any one day, was made with the agents and never withdrawn.

The president of the bank, who negotiated this matter, told the agents that his son or some one for him would call and redeem the money from them. A pass-book was kept between the bank and its agent, which was generally used by the person who went to Smith and Company to redeem the money.

Under this arrangement, the money was redeemed from time to time; and Joseph F. Randolph and Company, one of whom was Carman F. Randolph, the son of the president, frequently received it and sent it to the president; sometimes the president received the money himself.

It would seem then, that Carman F. Randolph was thus constituted the agent of the bank, to receive the bills of John T. Smith and Company. While this agency was in continuance, J. F. Randolph and Company gave to John T. Smith and Company the check in question, the amount of which the witness thinks was due for bills before and about that time delivered by Smith and Company to Randolph and Company.

What became of the bills for which the check is supposed to have been given, does not appear; whether they were delivered to the bank, or again put in circulation by Randolph and Company; nor whether any entry of their receipt was made in the pass-book. Nor does it appear how the bank usually accounted

[*Rubyon v. Farmers and Mechanics' Bank of New-Brunswick.*]

to Smith and Company for the bills redeemed; whether they were paid for in money, or credited at any time on account of the deposit.

The question then arises, were these persons, being thus the agents of the bank, Smith and Company, to redeem the bills from the public, and Carman F. Randolph to receive them of Smith and Company, acting within the scope of the authority in giving and receiving this check?

They were agents constituted for a particular purpose, and could not bind their principal if they exceeded their power: 2 *Kent's Com.* 484, and the cases there referred to.

The special authority must be strictly pursued, and whoever deals with an agent constituted for a special purpose, deals at his peril when the agent passes the precise limits of his power: 2 *Kent*, 484; *Fenn v. Harrison*, 3 *T. R.* 757. This rule will apply with peculiar force to the claimants, as they had full knowledge of the extent of the power of Carman F. Randolph.

Now it is manifest that Smith and Company were not authorized to let bills go upon the credit of any but the bank; and that neither J. F. Randolph and Company nor C. F. Randolph were authorized to endorse or draw for the bank.

When, therefore, J. F. Randolph assumed to pay for the bill by the check of his firm, he exceeded his authority. If J. F. Randolph and Company were acting as agents, and this transaction was on their own account, the result is the same, an excess of power; and so likewise did Smith and Company exceed their authority when they received the check. In so doing, they relied upon the responsibility of Randolph and Company, and must therefore bear any loss consequent upon such reliance.

Such construction was obviously put upon the transaction by the parties themselves; for although Randolph and Company failed on the same day the check was given, and the bank was still going on in business, and for aught that appears was then able to pay the amount of the check, yet there is no evidence of any claim made upon the bank, or upon any of its officers, or of notice even of the non-payment of the check. But on the

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contrary, Randolph and Company, then confessedly insolvent, were prosecuted by Smith and Company upon this claim to judgment and execution, and only money enough made to about cover the costs of suit. And two years after the date of the check, it is presented as the evidence of a claim upon the funds of the bank.

On mature deliberation upon the whole case, I am satisfied that the claim of the appellants has no foundation in law or equity, and that the receivers have not erred, but that their determination should be affirmed, with costs.

Decree accordingly.

JULIA SMITH v. The EXECUTOR of RESCARRICK MOORE.

Though there be no express evidence of the delivery of an ante-nuptial agreement, and though it be found in the husband's possession after his death, its delivery will be presumed, if its due execution be proved, and it appear that it was recognized by the husband.

If an executor receive the effects of his testator, without applying them in due course of administration, his estate becomes liable for the money so received, and his executor may be called upon in equity to pay the legacies in due course of the administration of the assets which came to his hands.

BILL for the recovery of a legacy bequeathed to the complainant by the will of Ann Wilson, bearing date on the seventeenth day of March, eighteen hundred and nineteen. The bill states that the will was made by virtue of an ante-nuptial agreement, entered into by the testatrix previous to her marriage with her intended husband, in the words following, to wit: "Memorandum of an agreement made this seventh day of February, in the year of our Lord seventeen hundred and ninety-nine, by and between R. W. of the township of East Windsor, of the one part, and A. B. of the other part, witnesseth, that whereas there is a purpose of marriage between the said R. W. and A. B. the said W. covenants and agrees with

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the said A. B. that she shall have the sole right of all the money, goods and chattels, rights and credits she is now possessed of, for to will and bequeath the same to whom she pleaseth, if the said A. B. should die before the said W.; and if the said W. dies before her, she is to have the whole of all the goods, chattels, moneys, rights and credits, and no part of what she brings to him to be his estate. And it is further agreed to, by the said A. B. to and with the said W. that she is not to have any right of dower out of the said W.'s estate, if he should die before her, excepting what the said W. bequeaths and leaves her."

That the said R. W. afterwards, and on the day of the date of the said articles of agreement, intermarried with the said A. B. and departed this life about the twenty-fifth day of February, eighteen hundred and twenty, leaving her surviving.

That the said testatrix appointed Rescarrick Moore, and his wife Sarah Moore, executors of her said will, who duly proved the same. And that the said Rescarrick Moore possessed himself of the personal estate and effects of the said testatrix, to an amount more than sufficient to pay her just debts, funeral and testamentary expenses and legacies. That the said Rescarrick Moore died on or about the first day of May, eighteen hundred and thirty-five, having appointed the defendant sole executor of his will, who duly proved the same. That all the assets belonging to the estate of the said Ann Wilson, remaining unadministered in the hands of the said Rescarrick Moore, came to the hands and possession of the said Henry A. Moore; and that the said Henry A. Moore possessed himself of the personal estate and effects of the said Ann Wilson, to an amount more than sufficient to satisfy her legacies, remaining unsatisfied by the said Rescarrick Moore.

The defendant, by his answer, denies all knowledge of the ante-nuptial agreement set out in the complainant's bill; states that at the time of executing the pretended will, she was a married woman; denies that the said Ann Wilson was possessed of any personal estate at her death; states that by written

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articles of agreement between R. W. the husband of the said Ann Wilson, and the said Rescarrick Moore and Sarah Moore; the whole of the personal estate of the said Ann Wilson was transferred to the said Rescarrick Moore and Sarah Moore, upon consideration of their maintaining her during her life; that none of her estate came to the hands of the said R. M. as her executor, or to the hands of this defendant.

Hearing upon bill, answer, replication and proofs.

H. W. Green, for complainant.

S. R. Hamilton and *Vroom*, for defendant.

THE CHANCELLOR. The ante-nuptial contract is sufficiently proved. The subscribing witnesses being dead, their hand-writing subscribed to the instrument, and also the hand-writing of the parties is proved. There is no express evidence of the delivery of the instrument, and it was in the possession of Robert Wilson, the husband.

But he spoke of it as a valid agreement, and allowed his wife to use and manage her estate in accordance with its terms. He recognized it in his will, and it is fair to presume that it was duly delivered, although he may have had the custody of it.

The will of Ann Wilson was a good execution of the power reserved by the ante-nuptial contract: *Bradish v. Gibbs*, 3 *John. Chan. R.* 523, and the cases there cited; *Emery v. Neighbor*, 2 *Hals. R.* 142.

The informality of the contract does not destroy it, the intention, and not the form, being the object of inquiry: *Wright v. Englefield*, *Ambler*, 474; *Rippon v. Dawding*, *Ibid*, 565.

The legacies given by the will must be considered good, and must be paid, if her estate was sufficient.

It is said that she conveyed, in her life time, all her estate to Rescarrick Moore and his wife, in consideration of their servi-

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ces in taking care of her during the last six months of her life.

The instrument made for that purpose by her husband, to Moore and wife, could not convey her estate; it would violate the ante-nuptial contract, by which was secured to her the sole right to will or bequeath her property to whom she pleased.

Some evidence is given of her declarations of having given the property to Moore and wife, and her regret that it was all she had to give them for their care of her.

But whatever may have been her right of disposing of the property otherwise than by will, and whatever may have been her meaning by such declarations, they are all overcome by the subsequent acts of Moore and wife, who, as her executors, proved her will, and filed an inventory under their respective oaths, of the very property in question.

The only remaining inquiry is, whether the estate of Rescarrick Moore is liable for the amount of the legacies.

It is in evidence that all her property was delivered to him at the time that Mrs. Wilson went to live with him; that he found in making an inventory of it, that after her death at least nine hundred dollars was paid to him upon obligations formerly belonging to her.

In whatever capacity he received this property and money, he became liable for it during his life time, and his estate after his death. And such must have been his understanding when he acknowledged his liability to the legatees.

The executor of an executor, is the executor of the first testator. But the defendant is not sued as an executor of Ann Wilson, but as executor of Rescarrick Moore, and as such he is bound to respond to the complainant for the legacy due to her, in due course of the administration of the assets which came to his hands.

Let there be a reference to ascertain the amount due to the complainant.

NATHAN SATTERTHWAITE, Trustee of MARY ANN RECKLESS, v. WILLIAM I. EMLEY et al.

Equity will enforce a post nuptial settlement made in pursuance of a parol ante-nuptial agreement.

Such settlement cannot be considered voluntary.

The declarations of the husband, made during coverture, and shortly before the execution of the settlement, are not evidence of the ante-nuptial agreement.

Nor will a recital of such agreement in the deed of settlement, be evidence of the agreement, except as against the husband and persons claiming under the settlement.

A deed of settlement made by a husband in favor of his wife, after marriage, in pursuance of an alleged parol ante-nuptial agreement, there being no proof of such agreement but the declarations of the husband and the recital in the deed, held void as against the creditors of the husband, whose debts were in existence at the date of the deed.

Kinsey and H. W Green, for complainant.

Dayton and Vroom, for defendants.

THE CHANCELLOR. The bill in this case sets forth that the defendant, Mary Ann Reckless, then Mary Ann Patrick, on or about the second of October, eighteen hundred and thirty-seven, intermarried with the defendant, Joseph W. Reckless. That prior to the marriage it was agreed between them, that certain real and personal estate of which she was then seized and possessed, should be conveyed and assigned to certain uses and trusts, and subject to certain powers and limitations, in the said bill mentioned, part of which were to provide for the enjoyment of the property by the said Mary Ann, to her sole, separate use during the coverture.

That afterwards, the defendant, Reckless, represented to his wife, that in the event of her death he would derive no benefit from her estate; that she could not make a will; and that they

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would convey it to a trustee, pursuant to the ante-nuptial agreement, as soon as they could agree upon one, and induced her to unite with him in a deed to his son Joseph, who was to immediately reconvey the property to his father.

Accordingly, on the thirty-first of July, eighteen hundred and thirty-nine, Joseph W. Reckless and his wife, executed their deed to Joseph W. Reckless, junior, conveying to him in fee, all the real estate of the wife; and Joseph W. Reckless, junior, at the same time, reconveyed the same to his father, by deed dated first of August, eighteen hundred and thirty-nine.

That these deeds were kept by the defendant, Reckless, in his trunk, until the first of March, eighteen hundred and forty-one, when his son Anthony found them, and put them on record.

That on the eleventh of June, eighteen hundred and forty-two, Reckless and wife made a deed of trust of the same premises, to Nathan Satterthwaite, the other complainant, in consideration of the ante-nuptial agreement, and in conformity therewith, and reciting the same.

That subsequently to the marriage, divers judgments were obtained against Reckless, upon which all his own property was sold, and writs of *testatum fi. fa.* were then issued and levied upon the property of the wife, and a part thereof sold by virtue of the older judgment, leaving a surplus. Application was made to the supreme court by the creditors, for an order appropriating the surplus to the next execution.

That the supreme court declined making such order, but directed the money to be retained in court, until the validity of the trust deed could be tested by suit in this court.

The bill prays that the trust deed may be declared valid against Reckless and all other persons claiming under him, and against the defendants, and that the sale of the residue of the property may be perpetually restrained.

This case involves the interesting question of the validity of a post-nuptial settlement made in pursuance of a parol ante-nuptial agreement.

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And if such ante-nuptial agreement were fairly shown, I should be inclined to give validity to the settlement, in pursuance of it.

Such settlement could not be considered voluntary, but upon a good and valuable consideration, to wit, the marriage, and the conveyance of all the wife's estate.

But there is no satisfactory evidence of such agreement.

The declarations of the husband, made during coverture, and shortly before the conveyance by the wife and himself to his son, are not sufficient. To allow such evidence would be dangerous in the extreme, and would enable any person who might be willing to make such a declaration, to defraud his creditors. In *Reade v. Livingston*, 3 *John. C. R.* 488, similar declarations of a husband were regarded as insufficient to support a settlement. See also *Atherly on Marriage Settlements*, 148; *Randul v. Morgan*, 12 *Vesey*, 74.

Equally dangerous would be the admission of the recital of such agreement in the deed of settlement, as evidence of the agreement. It is true, that efforts have been made in courts of equity, to sustain settlements purporting to be founded upon a parol ante-nuptial agreement, recited in the deed: *Dundas v. Dutens*, 2 *Cox*, 235; *S. C.* 1 *Vesey*, 196. But if allowed, I see no reason why any fraudulent creditor may not avoid the statute in any case, by a mere recital in his deed, of an ante-nuptial agreement. In *Reade v. Livingston*, chancellor Kent doubted much whether a post-nuptial settlement could be held valid against creditors, by the mere force and effect of a recital in it of a prior parol agreement. In *Battersbee v. Furrington*, 1 *Swans.* 106; 1 *Wilson*, 88, it was held that such recital was conclusive against all persons claiming under the settlements, but not evidence against the creditors, without other distinct proof.

Reason and policy, I think, demand other proof than such recital.

However desirable it may be to secure to this lady her property, which she had a right to expect would have been secu-

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red to her, I feel constrained to say that the deed of trust to Satterthwaite is void as against the creditors, all of whose debts were in existence at the date of that deed.

As against the husband and all claiming under him, except such creditors, the deed is valid, and the trusts therein contained must be fulfilled and executed.

JOSEPH HOLMES et al. v. BENJAMIN STOUT and JOHN WILLIAMS.

Possession, to constitute notice of a claim of title sufficient to put a purchaser on inquiry, must be an actual possession, manifested by notorious acts of ownership, such as would naturally be observed by and known to the public.

The grantee of a *bona fide* purchaser without notice, is not to be charged with the incumbrance or fraud, although known to such grantee before he acquired his title.

Vredenburgh and Randolph, for complainants.

Ryall and Wall, for defendants.

THE CHANCELLOR. On the twenty-third of August, eighteen hundred and seventeen, Andrew Bell conveyed to John Holmes, junior, a tract of land of sixty-four acres and four hundredths, in the county of Monmouth, for one hundred and nineteen dollars, and took his note for the money.

On the tenth of December, eighteen hundred and seventeen, John Holmes, junior, conveyed to John Holmes, senior, twenty-two acres, parcel of the lot of sixty-four acres and four hundredths, for fifty dollars.

On the twenty-seventh of August, eighteen hundred and twenty-seven, John Holmes, junior, represented to Mr. Bell that he had lost his deed, and that it had not been recorded, and

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urged him to make out a new deed for the sixty-four acres and four hundredths of an acre lot, to his brother-in-law, Richard Lane. Mr. Bell at that time declined making a new deed; but on the next day, Holmes, junior, and Lane called upon him and urged him till he was induced to execute to Lane a new deed for the premises, dated the twenty-eighth of August, eighteen hundred and twenty-seven; and Lane then paid Mr. Bell sixty dollars on Holmes's note. Part of the money due on the note still remains unpaid. The deed was recorded on the seventeenth of September, eighteen hundred and twenty-seven.

In eighteen hundred and thirty, Lane died, intestate, and his administrators, by virtue of an order of the orphans' court, sold and conveyed the whole premises to Stout and Williams, the defendants, by deed dated the seventh of November, eighteen hundred and thirty-two, and recorded on the twenty-fourth of November, eighteen hundred and thirty-two. The deed from John Holmes, junior, to John Holmes, senior, was not recorded until after the execution of the administrators' deed to Stout and Williams.

The complainants, claiming under John Holmes, junior, now file their bill, and seek a perpetual injunction, to quiet their title, and to set aside so much of the deed from Bell to Lane as covers the twenty-two acres before conveyed to John Holmes, senior.

From the testimony in the case, Lane appears to have been a purchaser for a valuable consideration, and as his deed was duly recorded before the deed from John Holmes, junior, to John Holmes, senior, his claim to the premises is to be preferred, unless it can be shown that he purchased *mala fide*, or with notice of the deed to John Holmes, senior: *Act of 7th June, 1799, sec. 8, Pat. 399.*

It is not enough to show that he had notice of the deed from Mr. Bell to John Holmes, junior. Lane purchased of Holmes, junior, and whether the conveyance were made by Holmes or Bell, was as between them immaterial.

There is no proof of actual notice to Lane, nor of any constructive notice, unless it be under the allegation of possession

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of the premises by Holmes, senior. Possession is sometimes notice of claim of title, sufficient to put a purchaser on inquiry; but it must be an actual possession, manifested by notorious acts of ownership, such as would naturally be observed by, and known to the public.

In this case there is no evidence of such possession. The premises consist of uninclosed woodland, except about two acres, which are included within the inclosure of an adjoining tract of forty-five acres. Upon it John Holmes, senior, occasionally cut wood, which cutting, under the circumstances, would be regarded as so many trespasses quite as probably as acts of ownership.

As to possession being notice, see *Daniels v. Davison*, 16 Ves. 249; *Taylor v. Stibbert*, 2 Ves. 440; *Smith v. Low*, 1 Atkyns, 490; *Allen v. Anthony*, 1 Merivale, 282; 2 Fonb. Eq. B. 2, ch. 6, sec. 3, and note (m.); *Hanbury v. Litchfield*, 2 Mylne and Keene, 629, 632, 3; *Flagg v. Mann*, 2 Sumner R. 485, 554, 555.

If Lane, then, were a bona fide purchaser without notice, the sale to the defendants by the administrators may be good, even though the defendants had such knowledge and notice of all the circumstances of the case. For it is well settled, as a general rule, that the grantee of a bona fide purchaser without notice, is not to be charged with the incumbrance or fraud, although directly known to him before he acquired his title; otherwise the loss must be visited upon the bona fide purchaser, as he would thereby be obliged to keep the property, or to sell it at such price as would enable his purchaser to discharge the incumbrance or purge the fraud: *Harrison v. Forth*, Prec. in Ch. 51; 2 Fonb. Eq. B. 2, ch. 6, sec. 2; *Lowther v. Carlton*, 2 Atk. 242; *Ferrars v. Cherry*, 2 Vern. 383; *Mertins v. Jolliffe*, Amb. R. 313; *Sweet v. Southcote*, 2 Brown's Ch. R. 66; *McQueen v. Farquhar*, 11 Ves. 477, 8; *Ingram v. Pelham et al.*, Amb. 153; *Alexander v. Pendleton*, 8 Cranch, 462; *Fitzsimmons v. Ogden*, 7 Cranch. 2.

In this view of the case, it is unnecessary to inquire into the

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alleged notice to the defendants. The bill must be dismissed, with costs.

Decree accordingly.

JOSIAH KAY v. The EXECUTORS of JACOB KAY.

A testator bequeathed the one equal undivided eighth part of the residue and remainder of his estate, both real and personal, to his son, J. K. "to hold and to have the issues, profits, rents and interest arising from the said bequest, during his natural life, but not to have and to hold it in fee simple, to sell and commit waste thereof, and at his decease to descend to his legal heirs at law." *Held*, that the legatee took an absolute interest in the personal estate.

BILL for a legacy. The bill states that Josiah Kay, late of the county of Gloucester, by his will duly executed, bearing date the eleventh of September, eighteen hundred and forty-one, among other things, gave and devised as follows, viz: "I do will and bequeath all the residue and remainder of my undivided estate, both real and personal, to my eight children, to be equally divided, share and share alike, to each one as named and designated as follows, viz: My son, Jacob Kay, one equal eighth part, to hold to him, his heirs and assigns for ever;" and after similar dispositions in favor of several of his children, the testator adds, "My son, Josiah Kay, living in the township of Waterford, county and state aforesaid, one equal undivided eighth part, to hold and to have the issues, profits, rents and interest from the said bequeath during his natural life, but not to have and to hold it in fee simple, to sell and commit waste thereof, and at his decease to descend to his legal heirs at law."

That the testator appointed the defendants executors of his will, who duly proved the same, and who, on the second of October, eighteen hundred and forty-three, settled a final account in the orphans' court of the county of Gloucester, whereby they

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acknowledged to have in their hands on that day, the sum of twelve thousand three hundred and forty-seven dollars and twenty-eight cents, the residue of the testator's personal estate, to one eighth of which the complainant is entitled, by virtue of the foregoing bequest.

The defendants, by their answer, admit all the material facts stated in the bill, but state that they have been advised that doubts exist whether by the terms of the will, the complainant took an absolute interest in the personal estate bequeathed to him, or whether he is merely entitled to receive the interest thereof, and they submit themselves to the decree of the court, and ask for its direction, whether the legacy should be paid to the complainant or put out at interest for his benefit.

Hearing upon bill and answer.

Carpenter, for complainant.

Browning, for defendants.

Brief of complainant's counsel.

The question to be settled in this proceeding is, what interest does Josiah Kay take by virtue of the above devise and bequest as to the personal estate, or the one eighth part thereof, so bequeathed to him?

If the bequest of the personal estate stood alone, unconnected with the devise of the real estate, it would be a good limitation of personal property, and the legatee would take an estate for life, remainder to his heirs, construed in such case, next of kin: 4 *Kent*, 536, n. 3d. ed.; 1 *Powell on Devises*, (by *Jarman*,) 329, note.

Under such circumstances, it would be the duty of the executors to invest his share of the residue, and pay him the proceeds thereof during life.

But the bequest of the personal estate does not stand alone. The disposition of the real and personal estate being blended together, and the manifest intention being, that they should be

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enjoyed together, the same construction must be given to the words "legal heirs" as applied to the devise and bequest of both descriptions of property. The "heir" as heir will take the whole: 4 *Kent*, 536, note; 3d. ed.; *Gwynne v. Maddock*, 14 *Vesey*, 488.

The words "legal heirs," in this bequest, being restricted to the same sense in which they are used in the disposition of the real estate, it becomes important to inquire as to the estate taken under this devise in the real estate; for it is a settled rule, that the same words which under the English law would create an estate tail as to freeholds, give the whole interest as to chattels: 2 *Kent's Com.* 353; 2 *Black. Com.* 398; 2 *Pow. Dev. (by Jarman)* 631.

The rule applies to those cases in which, by the application of the rule in *Shelly's case*, the terms of the bequest would, if applied to real estate, create an estate tail: *Garth v. Baldwin*, 2 *Ves. sen.* 646, cited in 2 *Pow. Dev.* 633.

Devise of real and personal estate to B. for life, without impeachment for waste, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of B., creates an estate tail in real estate, and an absolute interest in personalty: *Brouncker v. Bagot*, 1 *Mer.* 271; *S. C.* 19 *Ves.* 574, cited 2 *Pow. Dev.* 633.

If, therefore, Josiah Kay, at common law, is entitled to an estate tail in the real property so devised to him in connection with the personal property in question, it follows, under the above rule, that the limitation over of the personal property will be void, and he will be entitled to an absolute interest in the same.

So far as regards the words, "to have the issues, profits, rents and interest arising from the said bequeath," it is well settled that a devise of the rents and profits, is a devise of the land itself: *Com. Dig.* "Devise," N. 1; *South v. Alleine*, *Salk.* 228; 4 *Kent*, 536; 1 *Harr.* 27.

And the law is the same even in the case of a grant: *Co. Litt.* 4 b.

The rule seems to be the same in case of the unlimited be-

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quest of interest, which is the usufruct of money as rent is of land: 2 *Pow. Dev.* 639, 40.

These words therefore may be omitted in the further examination of this devise, so that in short it may read thus, "My son, Josiah Kay, one equal undivided eighth part, to hold and to have during his natural life, but not to have and to hold it in fee simple to sell and commit waste thereof, and at his decease to descend to his legal heirs at law."

This devise comes clearly within the rule in *Shelly's case*, (1 *Co.* 104.) "When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs, in fee or in tail: always in such cases the word "heirs" is a word of limitation of the estate, and not a word of purchase." 2 *Black. Com.* 242.

This rule has frequently been recognized and adopted in New-Jersey, previous to the act of eighteen hundred and twenty: 1 *Pen.* 291; 1 *South.* 303.

There is an estate for life given by this devise to Josiah Kay, with an immediate limitation to his "heirs." As under the operation of the above rule, the word heirs is to be taken as a word of limitation, necessarily, he takes the whole estate comprised in these words; if it be construed to the heirs of his body, a fee tail, if to his heirs, a fee simple." 2 *Pow. Dev.* 429.

At common law, then, and before our statute, (*Rev. L.* 774, sec. 1,) the estate taken by Josiah Kay, in real estate, necessarily would have been either an estate in fee, or in fee tail; though by that statute the rule has been abolished,* and whatever he might have taken at common law, he now by its operation, certainly takes an estate for life in the real estate, which on his death, will go to and be vested in his children.

The statute (abridged) is as follows: "In case any lands shall be devised to any person for life, and at his death to go to his heirs, or to his issue, or to the heirs of his body; then after the death of such devisee for life, said lands shall go and be vested in the children of such devisee, equally to be divided be-

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tween them as tenants in common in fee, &c." *Act 18th June, 1820. sec. 1, Elmer's Dig.* 130.

The above act does not apply to the disposition of personal estate, the construction in relation to which must therefore be sought for by the aid of the same rules, as prior to the passage of that act.

Does, therefore, Josiah Kay take at common law, an estate in fee simple, or fee tail? Is his estate descendible to his lineal heirs only, or also to his collateral heirs, which constitutes the difference between an estate in fee tail, and an estate in fee simple? Of necessity the one or the other, under the operation of the rule in *Shelley's case*.

Though under either construction, the operation, I suppose, would be the same, and Josiah Kay would take the absolute interest in his share of the personalty; still it seems necessary to a satisfactory result, to further investigate the subject as to this point.

The words, "descend to his legal heirs at law," are technical words, and are to be taken in a technical sense, unless there is a clear indication of their having been used in another sense; and if taken in a technical sense, under the rule in *Shelley's case*, they unquestionably, give a fee simple. If this construction be adopted, it will be necessary to reject the previous words, "during his natural life, but not to have and to hold in fee simple, &c." as repugnant to the estate granted. Cases are to be found of such rejection, thus: Devise to A. and her heirs, for their lives. The latter words rejected as repugnant: *Doe v. Stenlake*, 12 *East*. 515; cited, 1 *Pow. Dev.* 358, *note*.

But as words are not to be rejected unless actually irreconcilable or inconsistent with some rule of law; and such construction is rather to be given, if possible, as will reconcile and give effect to all its parts; and also, such construction should be given as will as nearly as possible effectuate the intention of the testator; I am inclined to retain these words, and give them effect as indicating the meaning of the testator, in the



use of these words, "descend to his legal heirs at law;" that is to say, as indicating his intention to use these words in the restricted sense of the lineal heirs of Josiah Kay.

We may resort to the whole will to ascertain whether the intention of the testator, in the use of these words, was to use them in a restricted sense. And whenever this intention can be collected from the whole will taken together, let the phraseology in the particular clauses be what it may, it has always been construed to make an estate tail: 2 *South.* 417.

Now, to Josiah Kay for life, "and at his decease to descend to his legal heirs at law," using these words in their technical sense, gives a fee simple; but the previous expressions, "during his natural life, and not to have and to hold in fee simple," shows that he did not use them in that sense, but in a restricted sense; of consequence in the sense of his lineal heirs, in which case, (whatever further might have been the intention,) the law raises an estate tail.

This construction receives further confirmation by referring to the previous clauses in this will, in which their respective shares are given to the other children of the testator. In those clauses, the several devises to such children are in the following form: "My son Jacob Kay, &c. one equal, undivided eighth part to hold to him, his heirs and assigns, for ever." It has been laid down by lord Eldon, as a rule of construction, that where a testator uses an additional word or phrase, he shall be presumed to have an additional meaning: 2 *Pow. Dev.* 9.

Now, the testator in the other clauses of this will, when his obvious intention was to create a fee simple estate, uses that form of words which the law has peculiarly provided for that end; he uses the formal phraseology, "to hold to him, his heirs and assigns for ever." When he comes to the devise to Josiah, he uses other words, and obviously in order to arrive at a different result; and therefore, in some other than the technical meaning, and clearly, collecting his intention from the context, with the view to limit the estate to the lineal descendants of Josiah: using, with a mistaken sense of its technical mean-

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ing the tautological expression, "descend to his legal heirs at law."

The rule of the law overrules the intention, so far as regards the intent to give Josiah Kay a mere life estate, vesting in him, by its controlling operation, the whole estate of inheritance, whatever that may be; but this rule has, so far as I can perceive, no operation on his intention in the use of the words, "legal heirs, &c." It leaves the sense in which he used those words, to be ascertained from the context, and by the usual rules of construction; and when ascertained, then that meaning to limit and designate the character and extent of that estate of inheritance.

The rule in *Shelley's* case is not a rule of construction, but only a rule by which the character of the estate granted or devised, is fixed and defined after the meaning shall have been ascertained by the usual rules of construction. See *Hayes on Estates Tail, passim.* (7 *Law Lib.*)

The following is a case in point, and which was a devise of property both real and personal. A devise "to my daughter J. S. and her heirs, for ever, and not to be disposed of to none from them, but to J. S. and her heirs for ever," was decided to be an estate tail. This case is closely analogous; the words, "her heirs, for ever," being restricted to lineal descendants, in consequence of the words, "not to be disposed of to none from them," explaining and fixing that to be the sense in which they were used by the testator: *Sewell v. Howard*, 1 *Harr. and McH.* 45.

To return to the rule in *Shelley's* case. If the word "heirs," is taken to mean heirs of the body, of course, at common law, an estate tail is created.

"Devise to A. for life, and after his death, to the heirs of his body, estate tail executed in A.:" *Com. Dig. Devise, N. 5, Salk.* 679.

If, then, the result be that Josiah Kay, at common law, would take an estate tail in the real estate, he in consequence, takes the personal estate absolutely, and is entitled to receive the same unconditionally from the executors.

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But if (and it is the only doubt in the case) instead of an estate tail, at common law, under this devise he would take an estate in fee simple in the real estate, the result, so far as regards the personalty, would be the same.

Under the operation of the rule so frequently referred to, he must take either the one or the other; and the gift of the personalty being connected with the devise of the real estate, if the same words which create an estate tail as to freeholds, give the absolute interest as to chattels, *a fortiori*, will that be the case of a fee simple.

If in case of an estate tail, limitations over of personal property are too remote and of consequence void, of course, such will be the case after a fee simple.

Devise of all the real and personal estate; if devisor die without disposing of it, then to D. Limitation over held void; because the first devisee took a fee by the word "estate," and therefore, limitation repugnant: *Jackson and Livingston v. Delancy*, 13 John. 537; *Jackson v. Robins*, 16 *Ibid*, 537.

At all events, in this case, if Josiah Kay takes a fee, he takes the whole estate, and the point proceeding on the very ground that the heirs do not take by purchase but by descent, there is in this case no limitation over, and no question can be raised on the subject.

So that in both points of view, and whichever construction may be given to this devise, as in fee, or in fee tail, Josiah Kay becomes entitled to the absolute interest in the personalty, and the decree of the chancellor should be in his favor.

Costs should be paid by the executors, out of the general estate. The general rule in equity as to costs is, that whenever a testator has expressed himself so ambiguously as to make it necessary to come into court, his general assets must bear the costs: *Ward on Legacies*, 392; *Beames on Eq. Costs*, 14.

THE CHANCELLOR. The complainant is entitled to the relief sought. He takes an absolute interest in the personal estate

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bequeathed to him in the residuary clause of the will, and is entitled to a decree that the whole amount be paid to him. The debts must be paid out of the general estate of the testator.

Decree accordingly.

ETER STEVENSON and REBECCA M. his Wife v. REBECCA BROWN et al.

where a testator charges his lands with the payment of legacies, and devises the use of the land to his wife as long as she remains his widow, in lieu of her dower; if the widow accepts the devise, she takes it subject to the incumbrance of the legacies.

The settled principle of equity is, that he who accepts a benefit under a will, must conform to all its provisions and renounce every right inconsistent with them.

There is no rule distinguishing between the widow and other devisees.

The devisees under a will, by accepting the devise, assume the payment of the legacies charged on the real estate, in the proportion of their respective estates in the land devised; and a purchaser under one of the devisees must bear his proportion of the charge.

Upon a bill by husband and wife for the recovery of a legacy bequeathed to the wife, she is entitled to a reasonable provision out of the legacy before decree in favor of the husband.

H. V. Spear, for complainants.

Vandyke, for defendants.

THE CHANCELLOR. Lewis Brown, late of Middlesex, died, leaving a will dated January fourteenth, eighteen hundred and forty, containing the following clause: "Also, I give and bequeath to my dear and beloved wife, Rebecca Brown, as long as she remains my widow, the use of my farm and salt meadow, together with my live stock sufficient for her use, and farm utensils and household furniture; and after her death the whole

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of my land and salt meadow, situate in the county and state aforesaid, to be equally divided between my two sons, John Lewis Brown and Jacob Owen Brown, their heirs and assigns for ever." He also charged his lands with certain legacies, and among others, with one of ninety-two dollars to Rebecca Maria, one of the complainants.

After the death of the testator, the widow, and by her consent the sons, continued in possession of the farm and salt meadow and personal property devised to her, and received the rents and profits thereof.

John L. Brown died in August, eighteen hundred and forty-one, intestate, leaving his brother Jacob, and his sisters Rebecca and Sarah, his heirs at law.

In July, eighteen hundred and forty-three, Jacob conveyed all his right and interest in the real estate to David Crowell, who is also made a party defendant.

Stevenson and wife now file their bill to recover the legacy to her.

On the part of the widow, it is insisted, 1st, That the devise to her is superior, and to be preferred before all the legacies; so that she may not be charged with any part of them during her widowhood. 2d, That the suit is prematurely brought, and cannot be properly commenced during her widowhood.

This being a devise of lands for life to the widow, is to be taken in satisfaction and bar of her dower, unless she expressed and filed her dissent therefrom, pursuant to the act of twenty-fourth of February, eighteen hundred and twenty: *Elmer's Dig.* 145, *pl.* 11.

The widow was at liberty to take her dower in the lands, or to accept of the devise. If she elected to take the devise, she must take it *cum onere*. There is no rule distinguishing between the widow and any other devisee.

The settled principle in equity is, that he who accepts a benefit under a will, must conform to all its provisions, and renounce every right inconsistent with them: *Glen v. Fisher*, 6 *John. G. R.* 35; *Blake v. Bunbury*, 1 *Ves.* 523.

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The devisees under the will, by accepting the devise, assumed the payment of the legacies, in the proportions of their respective estates in the lands devised.

The land is charged with the legacies, and the defendant, Crowell, holds subject to them, and must bear his proportion of the charge.

Let there be a reference to a master to ascertain the amount due upon the legacy to the complainant, Rebecca Stevenson, charging interest from the time it became payable, and how much thereof is chargeable upon the tenants of the premises devised, in proportion to their several interests therein.

The wife, Rebecca, is entitled to a reasonable provision out of the legacy, before a decree in favor of the husband is pronounced: *Howard v. Moffat*, 2 *John. Ch. R.* 206. And the master will also ascertain what is a proper settlement in the case, unless the wife waives her provision.

PETER T. SMITH v. The TRENTON DELAWARE FALLS
COMPANY et al.

If one of several joint mortgagees dies, his representatives must be made parties to a bill affecting the rights or interests of the mortgagees. Such bill cannot be filed by or against the survivors only.

If the effect of granting the prayer of a bill will be to relieve the receivers of an incorporated company from a portion of their duties, and to effect, *pro tanto*, a removal of the receivers, they must be made parties.

Under the act, entitled, "An act to prevent frauds by incorporated companies," the receivers have authority to compel a disclosure of the knowledge possessed by any person of the affairs and transactions of the company, and a creditor may have such disclosures, upon a proper application for that purpose to the receivers. He cannot maintain a bill for such discovery.

Nor can a bill be maintained by a creditor of an incorporated company, after the appointment of receivers, to settle the validity and priority of claims and incumbrances upon the property of the company. It is the duty of the receivers to settle priorities, and in so doing to decide upon the validity of the claims against the company.

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Nor can a bill be sustained by such creditor to inquire into the validity of assignments or transfers of property made by the company. This also is within the province of the receivers.

Where a bill charges that an act of the legislature is contrary to the constitution of the United States, and in violation of the rights of the complainant, and illegal and void, the court will not, under the general prayer for relief, declare such act unconstitutional or void.

THE bill in this case is filed by an execution creditor of the Trenton Delaware Falls Company. After setting out the complainant's judgment and execution, it states, that the said company had constructed a raceway, and created a water-power at and near the city of Trenton; that they had executed sundry leases of water to different lessees, reserving large annual rents thereon; that the said leases are still subsisting, and owned by the said company; that assignments have been made, or attempted to be made by the said company, of certain of the said leases, but that such pretended assignments are invalid; and that the rents reserved thereon are equitable assets, and ought to be applied under the direction of the court in the payment of the complainant's judgment. That the said company have executed divers mortgages, which are incumbrances upon their real estate, prior in point of time to the complainant's judgment. States the said mortgages severally, and to whom made; that certain of the mortgagees are dead, leaving their co-mortgagees surviving. Charges that certain of the said mortgages cover only a part of the real estate of the said company; that some of them were never duly executed, having no wax or wafer seals, and that they were not duly acknowledged or recorded.

States that sundry judgments were also entered against the said company prior to the complainant's judgment; that certain of the said judgments are fraudulent as against the complainant, and ought not to be preferred to his judgment.

States that on the twenty-fifth of May, eighteen hundred and forty-three, a bill was filed in this court by Andrew Carrigan, a judgment creditor of the said company, whereupon such pro-

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ceedings were had, that the said company was declared to be insolvent, an injunction issued, and receivers were appointed, under the act, entitled, "An act to prevent frauds by incorporated companies." That in the bill filed by the said Carrigan, all the judgments and mortgages given by the said company were treated as valid incumbrances, and as neither the complainant nor any of the said mortgage and judgment creditors were made parties to the said suit, no opportunity is afforded to the complainant to test their validity in said suit. That two of the receivers appointed by the court are large creditors of the said company; that two of them are also officers and stockholders of the Trenton Banking Company, which claims priority over the complainant's judgment, and that the said receivers are unsuitable persons to settle the validity and priority of the several claims against the Trenton Delaware Falls Company.

States that a decree of this court was made touching the premises, by virtue of an act of the legislature of the state of New-Jersey, which act was unconstitutional and void. That the said receivers made sale of the chartered rights and franchises of the said the Trenton Delaware Falls Company, by virtue of another act of the legislature of New-Jersey. Charges that the said last mentioned act is also unconstitutional and void.

The bill prays that the several leases made by the company, and held by them, may be declared equitable assets, and be applied in payment of the complainant's judgment; that the priority of the several mortgages, judgments and incumbrances, against the said company, may be ascertained and established; that all such mortgages, made by the said company, prior to the complainant's judgment, as were not duly executed, acknowledged and recorded, may be set aside or postponed to the complainant's judgment; and that all judgments confessed by the said company for the purpose of preferring creditors, may be declared fraudulent as against the complainant.

Demurrers were filed to the bill, assigning several grounds of demurrer, which are stated in the chancellor's opinion.

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S. G. Potts and *Vroom*, for defendants, in support of the demurrers.

W. Halsted, for complainant, contra.

THE CHANCELLOR. The first ground of demurrer to the bill in this suit, is the want of proper parties.

It has been found difficult to gather from the authority of cases decided, a rule on the subject of parties, concise, yet sufficiently comprehensive to meet every case.

In *Wiser v. Blachly*, 1 *John. C. R.* 438, chancellor Kent observed that "the general rule is, that you must have before the court, all parties whose interests the decree may touch, because they are concerned to resist the demand, and to prevent the fund from being exhausted by collusion."

This rule is well sustained by the authority of the English books, and accords with the rule of Calvert in his treatise on *Parties in Equity*, page 11: "All persons having an interest in the object of the suit ought to be made parties."

This rule, although general, is not universal, but has its exceptions, in cases of creditors, or legatees of personal estate, whose interest is supposed to be defended by the personal representative: 1 *Vesey*, 105, 137; 1 *Brown C. R.* 303; and where parties are so numerous as would cause great inconvenience in bringing them in, or where one files a bill on behalf of himself and others.

If we apply this rule to the present case, it is manifest that the representatives of the deceased mortgagees, being interested in the object of the suit, should have been made parties.

The right to sue or defend, does not rest alone in the surviving obligee. An action at law is required to be brought in the name of the survivor of several obligees, or against the survivor of several obligors, because the parties must sue or be sued in the same right; but this is not the rule in equity, and consequently the fact of the obligation being joint, does not answer the objection.

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The decree in favor of Andrew Carrigan, against the company, is made a subject of complaint in the bill, and although its correction is not directly asked, yet it would seem to be indirectly sought, and if so, the interest of Carrigan may be affected, and he should have been a party.

The bill charges that the receivers of the company are so interested, that they are incompetent to determine the matters which may be brought in question before them.

This is not in terms an effort to remove them, but if the prayer of the bill is granted, they must be relieved of a considerable portion of their present duties, and *pro tanto* removed. Under such circumstances, it is manifestly right that they should be heard, and for that purpose made parties.

The demurrer, so far as relates to want of parties, must prevail.

It is said in the next place by the demurrants, that the complainant may have all the remedy he is entitled to, under the bill filed by Carrigan.

So far as relates to the relief specially prayed, he clearly may.

1st. As to the discovery sought.

By the act of sixteenth of February, eighteen hundred and twenty-nine, (*Elmer's Dig.* 35, sec. 10,) it is made lawful for the receivers, in order to enable them to ascertain and secure the property and effects of the company, to send for persons and papers, and to examine the said persons, and the president, directors, managers, cashier and all the officers and agents of the company, on oath or affirmation, respecting the affairs and transactions of the said company, and the estate, money, goods, chattels, credits, notes, bills, choses in action, real and personal estate and effects of every kind, of said company, on pain of imprisonment for refusing to be sworn or affirmed and to answer.

Under this act, the receivers have due authority to compel any person to disclose any knowledge he may possess, respecting the affairs and transactions of the company; and the complainant, on proper application to the receivers, could have had such

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disclosure. The receivers represent as well the creditors as the stockholders of the company, and the complainant, as a creditor, was a party to the bill of Carrigan, which was filed on behalf of all the creditors.

2d. As to the priorities of the incumbrances. The receivers have the authority, and it is their duty to settle them; and in case of dissatisfaction, an appeal to the chancellor is expressly given: *Elmer's Dig.* 36, sec. 16, 18.

In settling priorities, they must inquire into the validity of the several claims, and refuse to allow any they may believe to be fraudulent or illegal.

3d. And so may they also inquire into the validity of all the transfers made by the company, and should they find any of the property or choses in action of the company illegally transferred, they may with propriety, and should claim such as assets for the benefit of the creditors and stockholders.

But the complainant, by his counsel, insists that he is entitled to be relieved against two several acts of the legislature, which he alleges to be contrary to the constitution of the United States, and illegal and void.

I have not been able to see how the constitutionality of those acts can be called in question before the receivers, nor upon an appeal from, or exceptions to their determination, before this court, or in any way under Carrigan's bill, unless it be on a question of appropriation of the funds of the company by the receivers. If so, and the complainant's bill is properly framed, he may have any relief to which he is entitled under the general prayer. The correct rule I take to be that laid down by judge Story in his *Equity Pleadings*, 39, (pl. 40.) "The court may afford him the relief to which the party has a right under the prayer of general relief, provided it is such relief as is agreeable to the case made by the bill."

In *English et al. v. Foxal*, 2 Pet. R. 612, Mr. justice Thompson said, "There is no doubt but that, under the general prayer, other relief may be granted than that which is particularly

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prayed for, but such relief must be agreeable to the case made by the bill."

But the court will not in all cases be so indulgent as to permit a bill framed for one purpose to answer another, particularly if the defendant may be surprized or prejudiced: *Mitford on Pl.* 31.

The allegations of the bill in reference to those acts are so vague and indefinite, that a party defendant could scarcely anticipate that the complainant was seeking to have them declared void.

As to the first act, it is merely alleged that this court, under and by virtue of an act passed the eleventh of March, eighteen hundred and forty-two, (setting forth its title,) made a decree on the seventh of November, eighteen hundred and forty-three, which said act he charges to be contrary to the constitution of the United States, and therefore illegal and void.

What decree is here alluded to, and how it affects the case, we are left to surmise, and wherein the act is contrary to the constitution we are not told.

As to the other, it is alleged, that after the said decree of sale, and after the receivers had advertised all the chartered rights, &c. of the company, the legislature, on the fifteenth of February, eighteen hundred and forty-four, passed another act, (giving its title,) authorizing the receivers to sell those chartered rights, &c. free and clear of all mortgages, judgments, liens and incumbrances; which said act is charged to be contrary to the constitution of the United States, and in violation of the rights of the complainant as a judgment creditor, and illegal and void.

What relief the complainant could be entitled to, under such an allegation, and what he might seek at the bar of the court under the general prayer of the bill, it is not easy to discover; and if the act last mentioned were to be declared void, I have not been able to see how the complainant would be benefited thereby.

The demurrer to the bill I conceive to have been well taken,

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and it must be sustained. The complainant, however, has leave to amend, upon payment of costs. If he prefers not to amend the bill, it must stand dismissed, with costs.

RICHARD LEAYCRAFT V. FRANCES S. HEDDEN.

A *feme covert* is regarded in equity as a *feme sole*, in respect to her separate estate, so far as to enable her to dispose of it in any way not inconsistent with the terms of the instrument under which she holds.

If by the deed of settlement the husband has relinquished any right which he might have acquired in her estate by the marriage, and covenanted not to intermeddle therewith, but to permit the wife to dispose of it by deed, will, or otherwise at her pleasure; her right of disposition remains as it was before the marriage, and she is, in respect of the estate, *feme sole*.

But if the terms of the deed require a particular mode of disposition, those terms must be observed. Her power is limited by them, and she is *feme sole sub modo*, and only to the extent of the power expressed.

Where by the deed of settlement it is stipulated that the wife shall be permitted to make what disposition of the trust property she may choose, and that she may have the entire and absolute control over it, and dispose of the same by deed, will or otherwise, at her pleasure, and the trustee covenants to convey the said estates and property as she shall direct; *Held*, that the term convey must have been used as well in reference to the personal as to the real estate, and a direction by the *feme* to her trustee to execute a bond, may in equity be regarded as an appropriation of so much of the estate as may be necessary to pay it.

If a bond be executed pursuant to the direction of the *feme covert*, by her trustee, in his own name, her separate estate may be charged with the money due on the bond.

And if the trust be surrendered, and her separate estate held with her general property, so that no means of distinguishing it is afforded to the court, a general decree will be made against her for the payment of the money due on the bond.

THE bill states that on the first of August, eighteen hundred and thirty-nine, Frances S. Hedden, then the wife of Z. Hedden, since deceased, was, and for many years had been, in her own name, or in the name of some person in trust for her,

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seized and possessed of valuable real and personal property in her own right, and to her own separate and individual use, secured to her during her coverture by an ante-nuptial contract, in the words or to the effect following, that is to say: "This indenture, made the twenty-sixth day of May, eighteen hundred and twenty, between Z. H. of the first part, S. W. late S. B. of the second part, and J. W. B. of the third part: Whereas, a marriage is about to be had and solemnized between the said Z. H. and the said S. W. late S. B.; and whereas the said Z. and the said S. have mutually agreed that the said Z. shall not interfere or meddle with her present or acquired property, whether real or personal, and that the said S. W. be permitted to make what disposition of the said property she may choose: Now this indenture witnesseth, that the said Z. for and in consideration of the said marriage, hath covenanted, promised and agreed, and by these presents doth covenant, promise and agree to and with the said J. W. B. his heirs, executors, administrators and assigns, that he the said Z. will not interfere with the present or future acquired property, whether real or personal, of the said S.; and that she, the said S. may have the entire and absolute control over the said property, and dispose of the same by deed or by will, or otherwise, at her pleasure; and the said S. by and with the consent of the said Z. doth hereby release, assign and transfer to the said J. W. B. his heirs and assigns, all her estate, real and personal, whatsoever and wheresoever the same may be, in trust, to permit her the said S. to receive the rents and profits thereof to her own use, as the same shall from time to time accrue and be receivable, and devise the same by any will or testament she may choose to make; and further in trust that he, the said J. shall and will, at her request, convey the said estate and property to such further or other uses as she may by writing under her hand direct and appoint."

That the said Frances S. Hedden, on the said first day of August, eighteen hundred and thirty-nine, was interested in a lease of a lot of land in the city of New-York, and the com-

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plainant had loaned and advanced to the said Frances S. Hedden, or to others for her, and at her request, large sums of money, amounting to five thousand five hundred dollars, with which she had erected valuable buildings and improvements on said lot; that the term of years for which the said Frances S. Hedden held the said lot having expired, M. A. S. the owner in fee of the said lot, executed a new lease thereof for the term of twenty-one years, to R. M. W. the son-in-law and trustee of the said Frances S. Hedden; that the said R. M. W. took and held the said premises, in trust for the said Frances S. Hedden, without having any individual personal interest, and as evidence of such trust, executed to the said Frances S. Hedden a declaration of trust, wherein, among other things, he did declare and make known that he held the said premises "in trust, to permit her, the said Frances S. Hedden, to receive the rents, issues and profits thereof to her own use, as the same shall from time to time accrue and be received, and also to devise the same by any will or testament she may choose to make; and further in trust that I, the said R. M. W. shall and will at her request convey the said estate and property, or any part thereof, to such further and other uses, as she may by writing under her hand direct and appoint."

That on the said first of August, eighteen hundred and thirty-nine, the said Frances S. Hedden, in order to secure to the complainant the sum of five thousand five hundred dollars, loaned and advanced by him as aforesaid, made and executed to the complainant, under her hand and seal, an instrument in writing, whereby, after reciting the lease of the said premises to the said R. M. W. in trust for her, the said Frances S. Hedden, and her indebtedness to the complainant as aforesaid, she, the said Frances S. Hedden, for the purpose of securing to the complainant the repayment of the said sum of five thousand five hundred dollars, with interest at seven per cent. per annum, did direct and empower the said trustee, R. M. W. to execute to the complainant his bond or obligation for the said sum of five thousand five hundred dollars, with interest thereon at seven per

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cent., the interest payable half yearly, and the principal to become payable on the first of August, eighteen hundred and forty; and as a further security, to execute and deliver to the complainant a mortgage upon the said lot, to carry interest from the date of the said instrument, thereby ratifying and confirming whatever her said trustee should lawfully do by virtue thereof.

That on the said first day of August, eighteen hundred and thirty-nine, the said R. M. W. in pursuance of the said power and in execution thereof, made to the complainant his bond of even date, in the penal sum of eleven thousand dollars, conditioned for the payment to the complainant of the sum of five thousand five hundred dollars, with interest as aforesaid, and also a mortgage upon the said leasehold premises.

That the said trustee died about the year eighteen hundred and forty, and that Zadock Hedden, the husband of the said F. S. H. died in the year eighteen hundred and forty-one; that on the death of the said Zadock Hedden, the whole trust was surrendered to the said Frances S. Hedden, being then sole and unmarried, and that she is now seized and possessed of the same in her own right; that during the continuance of the said trust, as well during the life of her husband Z. H. as since, the said Frances S. Hedden has managed and controlled in person the said mortgaged premises, and treated the same as her individual and separate property, and until the summer of eighteen hundred and forty, personally paid the interest accruing on the said bond and mortgage to the complainant.

That in order to recover the principal and interest due on the said bond and mortgage, the complainant, by virtue of a power contained in the said deed and mortgage, and pursuant to the laws of the state of New-York, sold the said leasehold premises and became himself the purchaser for the sum of three thousand dollars; that after deducting the ground rent in arrear, and the costs of the sale, there remained about the sum of two thousand one hundred and sixty dollars to be credited on the complainant's bond; and that there still remains due him upon said

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bond a balance of three thousand six hundred and sixty dollars and eighty cents, with interest at seven per cent. from the first of November, eighteen hundred and forty-one.

That at the time of making the aforesaid loan of five thousand five hundred dollars by the complainant to the said F. S. H. she was seized and possessed in her own right of divers other tracts of land, standing in the name of the said trustee, the principal part whereof are situated in this state; and that the said Frances S Hedden is still seized and possessed of real and personal property standing in her own name, or in the name of some other person to her use.

The bill insists that the said Frances S. Hedden is liable in equity for the payment of the balance remaining due to the complainant on account of the money loaned to her as aforesaid, for her own and for the benefit of her separate estate, and for which he took the bond and mortgage of her trustee.

The bill prays an account of the sum due to the complainant, with interest, according to the tenor of the said bond and mortgage, and that the defendant may be decreed to be personally liable therefor, and to pay the same to the complainant, together with his costs at law and in equity.

The answer admits the ante-nuptial settlement, and the execution of the several instruments set out in the bill of complaint; but states that the said R. M. W. purchased the said leasehold premises on or before the first of June, eighteen hundred and thirty-five, with his own means and for his separate and individual use and benefit; that the sum of four thousand five hundred dollars was loaned by the complainant to the said R. M. W. to pay for the said premises, and that the said R. M. W. gave his individual bond and mortgage to secure the repayment thereof; that the said R. M. W. for the purpose of making some improvements upon the said premises, borrowed of the complainant, in the year eighteen hundred and thirty-five, the further sum of one thousand dollars, and gave him his individual bond therefor; that the said premises were owned and occupied by the said R. M. W. in his own individual right,

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until the year eighteen hundred and thirty-eight ; that the said R. M. W. being indebted to the defendant, she took an assignment of his interest in the said premises, for the purpose of securing her debt ; and that she was subsequently induced, by the advice of the complainant and of the said R. M. W. for the same purpose, to renew the said lease, without intending or designing to make herself personally liable.

Denies that the complainant made a loan to her for the purpose of erecting buildings or improvements on her separate property ; or that any part of such loan was used for that purpose.

Denies that any loan was made by the complainant for her separate use and benefit, or upon the credit of her separate estate ; and that as far as these statements are made in the recitals of any instrument signed by her, such recitals are false and fraudulent ; and the said instrument was signed by her without a knowledge or examination of its contents, and without being aware that it contained such recital.

The cause came on for final hearing upon bill, answer, replication and proofs.

P. D. Vroom, for complainant.

L. H. Sandford, for defendant.

Brief of defendant's counsel.*

First. The bill rests upon two allegations of matters of fact, viz. : 1. That the complainant made a loan to the defendant for the purpose of erecting buildings and improvements on her separate property, some part of which loan was used for that purpose. 2. That the loan was made for her separate use and benefit, and upon the credit of her separate estate.

* The reporter is indebted to the politeness of Mr. Sandford for full notes of his argument. The brief is published entire, as it contains an able examination, and a lucid review of the authorities upon an important question, which has given rise to much discussion and conflict of opinion. He regrets that he has been unable to procure the brief of the complainant's counsel.

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Neither of these allegations is sustained by the proofs in the cause. The answer positively denies them both; and it being responsive to the bill, it must be overcome by two witnesses, or by one positive witness and circumstances which are equivalent to another: *Neville v. Demeritt*, 1 *Green's Chan.* 322, 335; *Stafford v. Bryan*, 1 *Paige*, 239; 3 *Wend.* 532.

There is no positive witness against the answer. The complainant relies upon the recitals contained in the power to the trustee, Williams, authorizing the execution of the mortgage, in August, eighteen hundred and thirty-nine, and in the two declarations of trust.

The first declaration is not proved to have been delivered to the defendant, or brought to her knowledge. The entry of the register of deeds in New-York, that it was recorded at the request of S. Hedden, is not part of the record, and his certificate of that fact is not evidence. This has been so decided in New-York. The recitals in both declarations of trust are inconsistent with the allegation in the bill, that the money was lent to Mrs. Hedden to erect the buildings and improvements; and inconsistent with the proof, which is positive, that the four thousand five hundred dollars was lent to Williams, not to improve the property, but to buy it. Besides, the testimony leaves no room to doubt, that the recital of Mrs. Hedden's indebtedness in the power to Williams, (and which is the only testimony in the case to charge her with the original loans,) was fraudulently inserted in that instrument, without her knowledge, and certainly without her suspecting its object, or the use to which it was to be perverted.

At the most, they are mere admissions made by a married woman, ignorant of their effect, without the aid or advice of her husband, her trustee, or her counsel; which are not shown to have been read to or by her before execution, and which are proved to be untrue by positive and unequivocal testimony. And independent of the weight of the answer, the testimony on the part of the defendant is fully sufficient to overbalance the force of the admissions, and all the testimony on the part of the complain-

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ant. [In support of these positions, the counsel went into a minute examination of the pleadings and testimony in the cause.]

Further, the case made by the testimony is wholly variant from that made by the bill. For if there be any debt proved against the defendant, it is a debt incurred in eighteen hundred and thirty-five, and not in or about eighteen hundred and thirty-nine; and it was incurred for the purpose of buying the lot in question, not for the purpose of improving or benefiting property already belonging to the defendant. The bill as framed, therefore, cannot be sustained: *Knickerbacker v. Harris*, 5 *Wend.* 638, 646.

Second. If, however, the court shall come to the conclusion that the loan in question was made to Mrs. Hedden, then I submit that on the case proved by the complainant, he is not entitled to any decree.

I. By the laws of New-Jersey, (according to which laws this suit is to be determined,) a married woman is incapable of entering into contracts or obligations, except such as are prescribed by statute. And in respect of her separate estate she can act as a *feme sole*, only in the manner and to the extent prescribed in the trust instrument creating such separate estate.

(1.) As to her general incapacity there is no question. She cannot make a valid note, bond or covenant. In short, she cannot contract obligations: 2 *Story's Eq.* 625, s. 1397; *Whitbeck v. Cook*, 15 *Johns.* 483.

If the defendant had made a contract, the complainant might have sued her at law in *assumpsit*, as she was unmarried when this suit was commenced.

(2.) Then to what extent is a married woman's legal capacity enlarged, when she has a separate estate, and how far may she act in regard to it as a *feme sole*?

I of course confine my argument to an estate which, by virtue of some will, deed or settlement, is set apart for her sole use, with certain powers of enjoyment and disposal. Her property not thus settled, being subject to the marital rights of the husband, stands upon its original common law footing.

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I insist, that as the law is in this state, she can act as a *feme sole* in respect to her separate property, only to the extent and in the manner and form provided in the instrument creating it.

First, it is so upon reason and principle. Let us look at the history of the law on this subject.

In the early period of the English common law, property consisted so exclusively of real estate, that personal property was scarcely mentioned. The year books are filled with real actions, the very names of which now sound uncouthly to our ears; and while there are occasional actions of tort, those upon contract are of rare occurrence.

In this period, we find the common law on the subject of husband and wife clearly ascertained. The wife's legal existence was merged in that of the husband. If she had an estate of inheritance, it became his during her life, or his own, dependent upon issue of the marriage.

But as a compensation for this state of things, the husband was bound to maintain her; on his death she resumed the whole of her own estates, and became entitled to dower in his lands; and during the coverture, the law clothed her with an entire incapacity to contract, not merely with her husband, but with all others. She could not execute any valid deed. Her title to lands, and her inchoate right of dower, could only be conveyed or barred by a fine or common recovery, and upon a private examination before one of the judges of the highest courts in the kingdom. It was necessary for the husband to join in these assurances, else they were nugatory. A jointure was open to both parties, but that was in lieu of dower, and created a safe and certain provision for the wife. It was the only marriage settlement then known.

Such was the common law, and as such it became a part of the law of this state. It is still the law here, except as modified by the statutes of the state, and by the clearly defined changes which had been made by the English courts from time to time, prior to the revolution in seventeen hundred and seventy-six.

To proceed in the illustration. The commercial prosperity

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of England dates from the reign of Henry VII. and from that time to James I. its steady and rapid increase had brought into existence a vast amount of personal property; and the subsequent unexampled advance of England in wealth, has made personal estate nearly equal in value to the landed property of the kingdom.

The common law, originating when personalty was in effect of no moment, gave all the wife's goods and chattels to the husband.

During this commercial progress, the growth of uses, and the introduction of trusts on the destruction of equitable uses, (the wife taking no dower in either,) had further abridged her marital rights. And the greatly increased facilities for barring dower, and cutting off her inheritance, in part, through the multiplication of officers to take the wife's acknowledgement on fines and recoveries, had left her still more exposed to being despoiled of her estate.

These causes led to the introduction, in the seventeenth century, of marriage settlements, and provisions in wills, which vested property in trustees, for the sole and separate use of the wife, with various provisions for the mode of its use and disposal.

Their object was to provide a sure and indestructible support for wives and children, which could not be influenced by the casualties, misfortunes or attainder of husbands.

Not, as some recent cases in England and New-York would import, for the mere purpose of guarding the wife from the husband's influence; and at the same time depriving her of his protection in the transfer of her property, and of all those incapacities which the law had provided for her security against her own improvidence, unacquaintance with business and liability to fraud, imposition and undue influence.

As a species of trust, the separate estates of married women became a subject of equitable cognizance. The courts of law only looked to the trustee and the legal title.

The trust instruments invariably, as in this case, provided in

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accurate and well considered terms, the mode of enjoyment, and the manner in which the married woman might act upon, direct, appoint and control the property.

And the courts have uniformly held that they cannot act upon the wife's disposition of such property, or upon any writing or thing affecting it, as a contract or an agreement, but only as an equitable appointment under the settlement.

It is therefore plain, that the possession or ownership of a separate estate, does not confer on the wife the right to contract. She stands as at common law, incapable of making a contract or general engagement. She has a mere power of disposition, as incident to such estate, which operates only by way of appointment. And thus operating, how can she direct or appoint, in a mode other than that prescribed?

Her whole capacity to act upon the separate estate, is derived from the deed. How then can the law give to her a greater or different capacity than the deed itself expresses? The only reasonable ground of decision is, that as this whole artificial capacity is the creature of the trust instrument in each case, and in derogation of the old common law rule; equity will permit a married woman to act as a *feme sole* to the extent prescribed and required by such instrument; and in all other respects, and to all other intents, will leave her to the protection, as well as to the restrictions, of the common law.

The learned counsel for the complainant assumed, without citing any authority, that by the law as now established, the defendant's separate estate is liable for the debt claimed. It is conceded that no such decision has ever been made in the courts of this state. It is therefore an open question here, to be settled upon equitable principles, unless there be some controlling authority derived from the English law prior to the revolution.

II. This brings me to consider the point upon authority. It is undeniable that the balance of the recent decisions in England, and the New-York authorities, go to the extent of sustaining the case as made by the bill in this cause.

I will endeavor to satisfy the court that the English decisions

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are not controlling, and that the balance of judicial authority is clearly adverse to the New-York adjudications.

Until lord Thurlow decided the case of *Hulme v. Tenant*, in seventeen hundred and seventy-eight, the law on this point was unsettled and fluctuating in England; and for forty years after that decision it was much questioned, and the law of that case for many years, wholly denied.

The deviation there from what I deem the only consistent rule, commenced with lord Macclesfield, in *Powell v. Hankey*, 2 P. W. 82, in seventeen hundred and twenty-two. And it there rests more in the dictum of the judge, than the decision; for he refused to sanction the wife's disposition of the principal of her separate estate, although she had an absolute power of appointment. He held that she should not recover back from her husband's estate, the interest on her property which she had allowed him to receive, and that it might be deemed as used for her maintenance. The temper of this judge towards these benign provisions for wives and children, may be learned from his remark that it was against common right for a wife to have a separate property, and all reasonable intendments and presumptions were to be admitted against her.

In the next case, *Norton v. Turvill*, 2 P. W. 144, in seventeen hundred and twenty-three, the bond of the wife, though held to be void as a bond, was enforced by the master of the rolls, after her death, against the husband who had possessed himself of her property. It would seem also, that the wife by will made a trust to pay debts. That decision has no application here.

There are several other reported cases, from seventeen hundred and twenty-eight to the time of *Hulme v. Tenant*, where the court refused to decree arrears of pin money, and of other income, to the wife, where the husband had received or retained it, at the same time supporting the wife out of his own means.

These cases were generally strained against the wife, from a feeling adverse to these separate estates; which feeling at this day appears strange and unaccountable.

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I pass over the various *dicta* of chancellors and masters of the rolls, as being of no authority. We are now looking at decisions.

In *Standford v. Marshall*, 2 *Atk.* 69, the decision charged the income, by way of appointment. In *Clerk v. Miller*, 2 *Ibid*, 379, the same judge would not charge the wife on her parol promise.

Allen v. Papworth, 1 *Vesey sen.* 163, was an appointment of the profits merely, and made on a bill of the wife seeking it. On the other hand, in *Blackwood v. Norris*, *Cas. Temp. Talbot*, 43, cited, the court would not decree a fund to be paid to the husband, on the wife's consent in open court, it being her separate personal estate.

In *Grigby v. Cox*, 1 *Vesey, sen.* 517, the decree went as far as to hold the wife to perform a contract of sale of part of her trust estate; yet these stopped short in the middle of the principle established; for although she had other trust estates, the court would not compel her to charge on those a dower right existing on the one sold, and which was in the way of making a clear title.

In *Paulet v. Delaval*, 2 *Ibid*, 663, the decision was on the ground of the wife's confirmation, after she became sole.

In *Caverley v. Dudley*, 3 *Atk.* 541, the grant of an annuity was held beyond the wife's power, yet it was upheld as a loan to her.

These were all the reported decisions made in England, prior to the American revolution.

And I submit, that they utterly fail to establish the doctrine that the wife, in respect of her separate property, could deal with it as a *feme sole*, without regard to the mode prescribed in the trust instrument.

The cases are vacillating, inconsistent upon the very principles which they assert, and accompanied with repeated declarations of the judges, tending still farther to limit their effect.

For these, especially as to the power over her real estate, I refer to lord Hardwicke's observations, in *Hearle v. Greenbank*,

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Vesey, sen. 298, 303; *Peacock v. Monk*, 2 *Ibid*, 190; and *Paulet v. Delaval*, 2 *Ibid*, 668, 669.

I will speak of the subsequent current of decisions presently.

I now repeat that we have reached the period when the English decisions ceased to be authority, (properly so called,) in his state; and find no settled law which will sustain the case made by the bill in this cause. And there is no adjudged case charging the *corpus* of the wife's real estate with a debt incurred by her.

Now how stands this question on the weight of judicial authority, as *res integra* here.

And first, as derived from English jurisprudence. We have seen lord Hardwicke going to a great length, *haud passibus equis*, however; for he hesitated, and at times drew back.

In *Hulme v. Tenant*, 1 *Bro. C. C.* 16, which is the great English decision in the complainant's favor, lord Thurlow charged upon the rents and profits of the wife's separate leasehold estate, the amount of a bond which she had signed with her husband. He refused to charge even the income of her separate freehold estate. His predecessor, lord Bathurst, had decided against any charge.

It will be seen that this case is no authority for charging the principal of the wife's estate; but is directly opposed to such a charge.

Lord Thurlow's doubts as to the whole doctrine, were apparent in *Ellis v. Atkinson*, 3 *Bro. C. C.* 347, *note*, and *p.* 565. And finally, in *Pybus v. Smith*, 3 *Ibid*, 340; *S. C.* 1 *Vesey*, 189, he expressed his opinion freely and strongly against the extent to which the cases had been carried. See lord Eldon's account of it, in 8 *Vesey*, 175, and 11 *Vesey*, 221.

Then we have lord Alvanley and lord Rosslyn, at a later period, holding the contrary doctrine, and deciding that the power of appointment must be strictly pursued.

These decisions were *Sockett v. Wray*, 4 *Bro. C. C.* 183; *Hyde v. Price*, 3 *Vesey*, 437; *Milnes v. Busk*, 2

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Ibid, 488; *Whistler v. Newman*, 4 *Ibid*, 129; and *Mores v. Huish*, 5 *Ibid*, 692.

So that immediately after lord Thurlow's time, and for a period of fourteen or fifteen years, the doctrine of the English chancery was entirely against the law claimed in this bill.

Lord Eldon was clearly and emphatically against the doctrine contended for; although he seemed finally to consider it as having been sustained so often, as to be established.

Thus, in *Sperling v. Rochfort*, 8 *Vesey*, 175, he said it was impossible to know the result on the cases decided; that he wished the law might turn out for the protection of married women, to the extent in which it was represented by lord Rosslyn, in *Whistler v. Newman*.

In *Nantes v. Corrock*, 9 *Vesey*, 188, 9; he says that *Hulme v. Tenant* was "a prodigiously strong case;" and *Pybus v. Smith*, was also a very strong case, and a decision much against lord Thurlow's inclination. And he says lord Thurlow went no further than the rents, not against the estate itself, and clearly not against her person.

In *Jones v. Harris*, 9 *Ibid*, 497, lord Eldon speaks of it as an open question, and gives good reasons why the law should be as we contend it is.

In *Parkes v. White*, 11 *Ibid*, 220, 221, he says his mind is in great distraction on the subject. That upon principle a woman contracting marriage, loses all the powers she had as a *feme sole*. And lord Thurlow said that upon true principle, where equity allows her by contract, to place herself in the situation of *feme sole*, her faculties as such, the nature and extent of them, are to be collected from the terms of the instrument making her such.

Sir William Grant's views may be seen in *Wagstaff v. Smith*, 9 *Ves.* 520; and *Richards v. Chambers*, 10 *Ibid*, 550. And even that most able equity jurist was led by the misty and confused state of the law, growing out of the departure from principle, established in *Hulme v. Tenant*, to make directly conflicting decisions upon the wife's disposition of dividends on

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stock, in *Hovey v. Blakeman*, cited 9 Ves. 524; and in *Sturgis v. Corp*, 13 *Ibid*, 190.

But I conclude, that the rule came finally to be settled in England, since the date of the cases cited, that in equity, in respect of her separate estate, the wife may act as a *feme sole*, unless restricted by the instrument creating it. But such act, to be effective, must be in writing, and importing an obligation to pay; and operates as an appointment, and not as a contract.

It is needless to review the more recent cases establishing these doctrines. They never have received the sanction of the bar in England. See Mr. Belt's *Note 1, to 1 Bro. C. C.* 17.

Mr. Clancy, in his treatise on the *Rights of Married Women*, p. 341, &c., after stating the rule, declares that his own opinion is against any change being permitted, unless the writing expressly appoints it to be paid out of, or charged upon, her separate estate.

Mr. Roper, and his learned editor, Mr. Jacob, were evidently of the same opinion: 2 *Roper's Husband and Wife*, by Jacob, 243, *note*.

And some very recent decisions of the vice-chancellor of England, upon the provisions introduced into settlements in England, in order to obviate as far as practicable the injurious effect of these decisions upon the interests of married women, have drawn out the strong and open animadversions of the profession. See 6 *London Jurist*, part 2, page 263; 8 *Ibid*, part 2, 382.

The gross inconsistency of the rule as established there, is strikingly shown by this illustration.

Where the wife attempts to execute the express powers contained in the settlement, whether by deed or will, she must pursue the terms and formalities prescribed, to the very letter. And the house of lords has just decided there, on a writ of error, against the validity of such an appointment attempted to be made, pursuant to a power, because it did not purport to be attested by her in the presence of two credible witnesses, (the settlement prescribing that form of attestation,) although two

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persons had signed as witnesses in the ordinary way : *Burdett v. Doe*, 8 *Lond. Jur. Reports*, 1.

Yet in the same court, if the wife had signed a bond without her trustee or her husband's assent, although an utter nullity of itself, it would have been held a good appointment, and if large enough, have swept her whole estate.

Next, in the state of New-York. The question came before chancellor Kent, in *Jacques v. Methodist-Episcopal Church*, 3 *John. Chan. R.* 77; who, after a most able and thorough examination of the authorities and the principles applicable to the point, held, that a *feme covert*, in respect of her separate property, is to be considered as a *feme sole*, only to the extent of the power given to her by the marriage settlement.

The decree of this most learned and upright judge was reversed by a large majority of the court, in the court for the correction of errors, 17 *John.* 548; and to the extent of the facts involved, she was held enabled to act as a *feme sole*. As this decision is the foundation of all the law to this effect, which is found on this side of the Atlantic, I beg to dwell upon it somewhat at large.

The case was this. Jacques married a lady of large estate, who had been accustomed to an expensive style of living. Previous to the marriage, her property was settled in the usual form, to her separate use, and with absolute power of appointment by deed or will. During the coverture, she required the same style of living to be kept up; her husband paid those expenses, and she suffered him to receive and appropriate to his use, some portions of her income, and one considerable item of the personal property settled upon her. On her death she left no issue, and appointed one third of her property to the Methodist church, one third to her husband, Jacques, and one third to her collateral relatives. The contest in the suit, arose upon the claim of Jacques to retain what his wife had bestowed upon him in her life-time.

Having in view the constitution of the court of final resort in the state of New-York, many of the judges being laymen; it

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is not unjust to infer that the peculiar circumstances of that case, had a decisive influence upon the result. Indeed, we find the chief justice himself adverting to those circumstances in strong terms, (*p.* 581,) and speaking of the extreme hardship of throwing upon Jacques the charge of his wife's expensive equipage and establishment. We see also a spice of lord Maclesfield's hostility to these inventions of equity, in the opinions of the chief justice, and of judge Platt. The former confesses that his partialities in favor of marriage settlements, are not strong. He thinks the iron rule of the common law, the best adapted to promote the tranquillity and happiness of the married state.

Judge Platt is still more emphatic in his administration of the lethean despotism of the old rule of law, and he laments over the introduction of marriage settlements, and the "amphibious character" thereby given to the wife, (*page* 583.)

I will not pursue the remarks of that judge, which, I say it with regret, are creditable neither to his head or his heart.

I can say with confidence, that having in view the peculiar hardship of that case, the constitution of the court itself, and the powerful hostility of the two judges who read opinions, to the whole system of marriage settlements; it ought not to be deemed an authority, out of New-York, as against the unanswerable judgment of chancellor Kent.

The decision in *Jacques* has been followed, in that state, in the *North American Coal Company v. Dyett*, 7 Paige, 9, and recognized in *Gardner v. Gardner*, 7 *Ibid*, 115.

Chancellor Walworth, of course, assumed the case of *Jacques* to be settled law, and decided the case of *Dyett* accordingly, without any examination of the subject upon principle. I apprehend that if he had adverted to two considerations, viz. that the case of *Jacques* was one of administration after the death of the wife, (see 2 *Story's Eq. s.* 1898, *note* 1,) and that few even of the modern English cases, had gone the length of charging the capital of the wife's real estate; he would have come to a different conclusion.

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At all events, chancellor Walworth has not given the sanction of his own judgment to the principle involved in the final decision of *Jacques v. The Methodist Church*.

Therefore, when this honorable court shall look to the state of New-York for authority on this point, it will find on one side the decision of the court of errors, and on the other the great and decisive weight of chancellor Kent's judgment in the same case. And that he still entertains the same opinion, see 2 *Kent's Com.* 164 to 166, 2d edition.

In answer to the narrow views expressed by the common law judges in *Jacques's case*, in 17 *Johnson*, I beg to refer to portions of chancellor Kent's opinion in the same case when before him, in 3 *John. Chan. R.*

At page 88, he says, "These marriage settlements are made to secure to the wife, and her offspring, a certain support in every event, and to guard her against being overwhelmed by the misfortunes, or unkindness, or vices of the husband. They usually proceed from the prudence and foresight of friends, or the warm and anxious affection of parents. If fairly made, they ought to be supported, according to the true intent and spirit of the instrument by which they are created; and I am very unwilling to admit that, notwithstanding the cautious language of this settlement, the wife was to be deemed to have absolute dominion over the property as a *feme sole*, and not bound by the prescribed form of disposition.

"A court of equity will always carry the intention of these settlements into effect, when that intention is explicit and certain. The court will not suffer the grant to be defeated, or the intention of the settlement to fail. This is the general principle that pervades the cases, however discordant they may be in the application of their doctrines, or however perplexingly subtle in their distinctions. Now, if the meaning of the settlement in this case was, that the wife could only dispose of her estate, real or personal, by deed or will, or bar herself of the rents, issues and profits, by her receipts, how can the court uphold the husband in setting up a parol disposition, or gift?"

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Again, "if the instrument contains a prescribed form of disposition, I do not see why it is not as available as if the deed contained a proviso against any other mode of disposition; it is a question of intention and construction, merely."

At page 90, he says, "the intention evidently was, in this, as it is in most other cases of property settled to a married woman's separate use, that the interest should be unalienable, except in the mode provided. Then why should not the court give effect to that intention? There is no sufficiently uniform and unruffled current of authority to prevent it."

He says, lord Thurlow admits, again and again, that the wife has no power over the estate but what the instrument gave her; and this is a doctrine, intelligible, just and sound. And he asks, "why then may we not decide according to sound principle, and place the rights of the wife on a safe and durable foundation?" A question which is humbly, but most emphatically addressed to this court, where the point is open, and where every consideration of justice in the particular case, prompts your excellency to sustain chancellor Kent's decision.

Finally, at page 113, the chancellor concludes thus: "I apprehend we may conclude (though I do it with unfeigned diffidence) that the English decisions are so floating and contradictory, as to leave us the liberty of adopting the true principle of these settlements. Instead of holding that the wife is a *feme sole*, to all intents and purposes, as to her separate property, she ought only to be deemed a *feme sole sub modo*, or to the extent of the power clearly given by the settlement. Instead of maintaining that she has an absolute power of disposition, unless specially restrained by the instrument, the converse of the proposition would be more correct, that she has no power but what is specially given, and to be exercised only in the mode prescribed, if any such there be. Her incapacity is general; and the exception is to be taken strictly, and to be shown in every case, because it is against the general policy and immemorial doctrine of law. These very settlements are intended to protect her weakness against her husband's power, and

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her maintenance against his dissipation. It is a protection which the court allows her to assume, or her friends to give, and it ought not to be rendered illusory. The doctrine runs through all the cases, that the intention of the settlement is to govern, and that it must be collected from the terms of the instrument. When it says she may appoint by will, it does not mean that she may likewise appoint by deed; when it permits her to appoint by deed, it cannot mean, that giving a bond, or note, or a parol promise without reference to the property, or making a parol gift, is such an appointment. So, when it says that she is to receive from her trustee the income of her property, as it from time to time may grow due, it does not mean that she may, by anticipation, dispose at once of all that income. Such a latitude of construction is not only unauthorized by the terms, but it defeats the policy of the settlement, by withdrawing from the wife the protection it intended to give her."

The whole case of *Jacques* will, I doubt not, receive a careful examination, and I therefore refrain from further quotations.

In one other state, Alabama, that case as finally decided, has been followed, so far as to charge the wife's separate estate with a debt incurred for her use and the use of such estate, and for which the note or bond of the husband and wife was executed to the creditor: *Forrest v. Robinson*, 4 *Porter's R.* 44; *Sadler v. Houston*, *Ibid*, 208.

On the other hand, in several of the states, (the decisions of the courts in which are held in the highest estimation abroad,) and in all the other states in which the question has been examined upon principle, the decisions have corresponded with that of chancellor Kent.

First in order of time, it received a most elaborate examination by the chancellors in South Carolina, in *Ewing v. Smith*, 3 *Dess. Eq. R.* 417, 453, 455, 462, in February, eighteen hundred and eleven.

There a large estate was secured to the wife by settlement, to be for her sole and absolute use, on her surviving, and subject to her appointment by will.

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The debt was a joint bond of husband and wife, with the sanction of one trustee, given for goods supplied for the use of the family, and in part for the use of the trust property. (For negroes, &c. See *p.* 464.)

It was agreed by all the judges, to be a separate estate, and as subject to disposal, as if in her possession.

Chancellor Dessausure decreed payment out of the separate estate, on a bill, after the husband's death. This was reversed by the court of appeals.

See the clear and convincing opinion of chancellor Waties, (for thirty years an eminent judge in South Carolina,) at *p.* 456.

Chancellor Gaillard, in a short opinion, says, "the decree below was conformable to the late English decisions, but the case is *res integra* in this country, and to sanction the principle in the extent it is laid down in those decisions, would be to defeat the great object of marriage settlements, the protection of the property for the wife and children."

Chancellor Dessausure retained his opinion, feeling controlled by the English cases. And one other chancellor concurred with him; but the levity of his short opinion detracts much from its respectability.

This decision has been adhered to ever since, in South Carolina.

I should mention, that a case of *Carter v. Eveleigh*, reported in 4 *Dess.* was decided before that of *Ewing v. Smith*, and was referred to by chancellor Dessausure, in his opinion in the latter case.

In *Watson v. Cheshire*, 1 *McCord's Chan. R.* 233, 241, there was an attempt to charge the separate estate of the wife, with the amount of a note which she had signed with her husband, for his debt. The court held that her estate was not bound.

In *Magwood v. Johnston*, 1 *Hill's Chan. R.* 228, 231, the same doctrine was held as in *Ewing v. Smith*, and the latter decision approved.

In *Robinson v. Darf's Executors*, C. W. *Dudley's Eq. R.*

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128, 131, in eighteen hundred and thirty-eight, the principle was again applied, that the wife has no right to charge or dispose of her separate estate, even with the consent of her husband and trustee, unless it is otherwise provided by the terms of the settlement. Chancellor Harper says, that *Ewing v. Smith*, has been followed ever since; and in reference to *Hulme v. Tenant*, he says, in this respect the English decisions seem to make an exception to the general doctrine.

In eighteen hundred and forty, in the case of *Clark v. Mackenna, Cheves' Eq. R.* 163, all the previous cases in South Carolina were approved. There, on a trust by which the wife's separate property was made expressly liable for her own debts and contracts, it was charged with a debt of her's, contracted for necessaries. The chancellor says, that the power over the separate estate must be derived solely from the instrument conferring it.

In Pennsylvania, the question arose in *Lancaster v. Dolan*, 1 *Rawle*, 231, where the wife, having a separate real estate, for her sole use for life, and with no clauses restraining her disposition of it, mortgaged it with her husband, the mortgage reciting that it was for their joint debt. The court decided against the charge, and held that a *feme covert*, in respect of her separate estate, is to be deemed a *feme sole*, only to the extent of the power clearly given by the instrument by which the estate is settled, and has no right of disposition beyond it. The judgment of the court was unanimous.

Chancellor J. Gibson says, the English cases since our declaration of independence, have unsettled everything; and that they had better retain the old principle. That he is unwilling to follow the case of *Jacques v. The Methodist Church*; and that the English cases are so floating and contradictory, as to leave them at liberty to adopt the true principle of those settlements. And that she has no power but what is expressly given.

So in Tennessee. It was decided in *Morgan v. Elam*, 4 *Yerger's R.* 375, in eighteen hundred and thirty-three, that

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the power of a married woman over her separate estate, does not extend beyond the plain meaning of the deed creating the estate; and she is therefore to be considered a *feme sole*, in relation to the estate, only so far as the deed has expressly conferred on her the power of acting as a *feme sole*.

And when a particular mode or manner is pointed out for the disposition of the separate estate of a married woman, she cannot dispose of it in any other way.

The English, New-York and South Carolina cases were examined, and the court held the above points, after a very full and able argument at bar, and by the judges.

Judge Green, *p.* 445, says, "if these marriage settlements are supported at all, they ought to be supported according to their plain sense, and the manifest intention of the grantor. That it is a mockery to talk about supporting a conveyance, and at the same time give it such a construction as will allow a disposition to be made of the estate, which it was the manifest intention of the grantor to guard against." He says of judge Platt's argument in the case of *Jacques*, 17 *John.* 583, "that it is as defective in morals, as it is in sound legal principles." And see chief justice Catron's opinion, at *p.* 450.

The same point had been previously decided in the court of chancery in Tennessee, in the case of *Brantley v. Brantley*. See 4 *Yerger*, 447, 450, 451, where it is cited.

To these authorities against the rule of the late English cases, I may safely add the opinion of Mr. justice Story, and of chancellor Bland, in Maryland. See 2 *Story's Eq. sec.* 1400; *Helms v. Franciscus*, 2 *Bland's Chan. R.* 562.

Now, I submit with the utmost confidence, that the vast preponderance of judicial authority, is decisively and strongly against extending to a wife having a separate estate, any power as a *feme sole*, other than that expressly granted by the instrument creating the estate.

In England, we have the great names of Thurlow and Eldon, of Bathurst, Alvanley and Loughborough, with the uni-

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form expression of the profession, against the doctrines of Mac—clesfield and Talbot, and the uncertain policy of Hardwicke.

In New-York, the powerful authority of chancellor Kent—stands opposed to two common law judges, carrying with them—
their peculiar court of last resort.

Alabama has followed, reposing on that decision ; while the—courts of Pennsylvania, South Carolina and Tennessee, inves—tigating the question on principle, have steadily held to the con—trary opinion.

To these add the judgment of judge Story and chancellor Bland, and the whole presents a most imposing array of legal character and authority in favor of the rule of common sense, and the only rule which can carry out the benign intents of these invaluable provisions for the widow and the orphan.

Why should a different rule be adopted in New-Jersey?

You will not suffer a married woman to part with her freehold, except with the assent of her husband, and on a private examination before an officer. You permit her friends to make what they fondly deem, a more secure and infallible provision for her, by means of a settlement and a separate estate. With what reason or justice can you declare that she may charge, aliene and destroy that provision, without the knowledge or sanction of her husband, or even her trustee, and in virtual defiance of the mode of disposal which the settlement prescribes?

If such be the law, then, indeed, in the language of one of the judges whose opinion I have quoted, are these settlements a mockery. Nay, they are worse ; they are a delusion and a snare, by which, under the garb of entire protection, the rights of the wife are deprived of the safeguards of the common law, and exposed to the pillage of the artful, and unprincipled speculators. They rob her of the benefit of her husband's counsel in dealing with strangers, and leave her, unaided and friendless, to all the impositions so commonly practised on the confiding and unwary.

And to accomplish all this, you are asked to discard all well settled principles of law. You are to establish as a rule, that if

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a married woman with a separate estate, contracts a debt, the law must imply that she intended to pay it out of such estate, and construe it into an appointment accordingly; although the instrument declares she shall only appoint, by writing under seal. And yet, as if frightened with the consequences of so bold a proposition, you are to stop short, when half way in its application, and refuse to make any debt or appointment which is not evidenced by a writing, importing an obligation to pay. No reported case has yet gone the length of establishing a charge short of such a writing, and many cases have expressly decided against it. Yet the moment you lose sight of the mode of appointment prescribed in the trust instrument, and suffer the wife to act in respect of the separate estate, regardless of that mode, there is no reason or principle that will not give effect to her parol and implied engagements, as well as to those in writing and in express terms.

The only way of avoiding these inconsistencies, and the impracticable subtleties of the English cases on the subject, is steadily to adhere to the legal and reasonable ground which I have attempted to sustain; and to hold that equity, in enlarging the capacity of a married woman in respect of her separate estate, proceeds exclusively upon the basis of the powers conferred on her by the deed or will creating it, gives effect to such powers, and to those alone, and in every other respect leaves her under the disabilities of the common law. Equity is called upon to interfere by such deed or will, and to the extent of such powers; and it would be an assumption, almost an usurpation, to interfere beyond the powers themselves.

III. The trust in Mrs. Hedden's marriage settlement, limited her control over the estate to two specified modes of appointment, viz. by her last will and testament, and by a writing under her hand directing and appointing a conveyance.

The trustee was to convey the property pursuant to such a writing, and in no other manner. And she could in no other manner convey or control it.

She was to be permitted to receive the rents and profits to her

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own use, and those only from time to time, as they accrued; so that she could not, even by that appointment in writing, anticipate them.

But as to the principal, the *corpus* of the estate, she was powerless, except in the two prescribed modes. If she had died without any will or appointment, her estate would have gone as if no settlement had been made.

The previous paragraph in the instrument, by which her husband covenanted, contains no grant of power. The operative words are those contained in the declaration of the trusts; and those I have stated.

Thus the expressed intention of this settlement plainly and unequivocally forbids such a disposal of the estate as that attempted to be enforced in this suit.

If I am sustained in my second point, the court will have no occasion to go further.

IV. If, however, the court shall deem it proper to adopt the extreme doctrines of the New-York and modern English cases, still the complainant does not bring his case within the principles established.

1. The whole extent of the case made by the recitals and proof which form the complainant's evidence, is simply a loan of five thousand five hundred dollars to Mrs. Hedden, without any express promise to pay.

The testimony is conclusive, that four thousand five hundred dollars of it was borrowed to pay for the purchase of the leasehold. And as to the rest, the proof is not clear; and as the complainant claims, it only shows a loan of one thousand dollars to improve the property bought with the loan of four thousand five hundred dollars.

Therefore it is not proved that any of the five thousand five hundred dollars went for the benefit of Mrs. Hedden's separate estate; or that any of it was lent upon the credit of any of such estate, or upon the credit of any estate, save the premises mortgaged.

The most latitudinarian cases yet decided, require proof of

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one or the other. A mere general debt, has never been made a charge.

For this law I refer to chancellor Walworth, in the case of *Dyett*, before cited, 7 *Paige*, 9, and in *Gardner v. Gardner*, 7 *Ibid*, 116, 119. Also, *Clancy's Rights of Women*, and 2 *Story's Eq. s.* 1398.

(1.) As to the loans being for the benefit of her property.

The separate estate existed fifteen years before the loan. It was specific, and there was no provision for reinvestment.

The leasehold bought by Williams, the trustee, with the money lent, was no part of such estate, and could not benefit it. It was a speculation, an adventure, not authorized by the trust, and which could not be grafted upon it.

It is absurd to say, that a loan to her trustee, or even to herself, for the purpose of speculating in real estate never before owned by her, was for the use of her separate estate.

The case of *Magwood v. Johnson*, 1 *Hill's Ch. R.* 228, shows that to make a charge on that ground, the loan or debt must be to promote the objects of the trust.

The one thousand dollars lent to improve the speculation is no different, because the whole affair was unwarranted and not within the trust, and the complainant was cognizant of the whole.

(2.) There is no such thing as a personal liability, resting on a married woman by reason of her acts in reference to her separate estate; or on her other property which was not within the trust or a part of such separate estate: 2 *Story's Eq. s.* 1397; *Jones v. Harris*, 9 *Vesey*, 486; *Lee v. Muggeridge*, 1 *Ves. and Beames*, 118.

(3.) The whole liability ever set up against her, is against her separate estate, as such; and operates, not as a contract, but as a direction or appointment of the estate: 2 *Story's Eq. s.* 1399, 1401; *Field v. Sowle*, 4 *Russell*, 112; *Tullett v. Armstrong*, 7 *Lond. Jur. Rep.* 601, 603.

(4.) It follows that there must be an express charge upon the estate, or one implied from the nature of the liability: 2 *Story's*

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Eq. 627, s. 1399. We have seen that here none can be implied from the application of the loan.

(5.) The only express charge in this case is the mortgage, and limited to the leasehold purchased with the loan. And the very fact of taking an express and specific lien on that property, entirely repels and precludes the idea of any implied charge on other property. If any other were intended, it would have been taken, and the other property relied upon, included in this or another mortgage.

(6.) No charge upon the separate estate of a married woman has ever yet been implied, except from some writing signed by her, and importing an agreement to pay, and which can only be carried into effect upon her separate estate.

This appears abundantly by the authorities: 2 *Roper's II. and Wife.* by Jacob, 235, 238, 243, note. In *Duke of Bolton v. Williams*, 2 *Vesey*, 138, and *Jones v. Harris*, 9 *Ibid.*, 486, it was illustrated clearly. The attempt to create an express charge for annuities failed, because of some statutory defect, and the argument was, that the wife had acknowledged the receipt of money, and had shown in writing an intention to charge it upon her separate estate. The court, in each case, decided against the charge.

So in *Gardner v. Gardner*, the wife was joint guardian with her husband, and she had received and spent certain moneys of the ward. When she and her husband were removed from the trust, this deficiency was paid out of her separate estate. Yet she, as administratrix of her husband, was allowed, as against his next of kin, to take that amount from his assets.

If such is the doctrine in New-York, where the courts have proceeded so far on this subject; we surely may expect its application in this case, where there is no written charge, no promise to pay, not even a recognition of a debt, except in the direction to specifically secure it by a mortgage.

In *Tullett v. Armstrong*, 7 *London Jur. R.* 601, 603, July fifth, eighteen hundred and forty-one, lord Langdale, master of

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the rolls, held the point precisely in the language which I have stated, and refused to charge the separate estate.

(7.) A loan to a married woman, without her writing for its payment, stands upon the same footing as any general debt made by her. Her general debts are not a charge upon her separate estate.

I refer to the cases last cited, and *Clancy*, 341, &c.; 2 *Story's Eq. s.* 1398 and 1400.

Judge Story there says, that her separate property is not in equity liable for the payment of her general debts, or her general personal engagements. And that it is now expressly established, that such property cannot be charged with her general pecuniary engagements.

(8.) The separate estate of Mrs. Hedden was and is exclusively real estate. And no direction or appointment of hers could affect or incumber it, unless it were in writing, and signed by her, as required by the statute of frauds.

It is to operate as a charge or lien, and this creates a direct interest in lands, if it be availing at all: *Elmer's Digest*, 216, s. 14, act of November, 1794; 2 *Roper*, 243 n. and 244 n.; *Nantes v. Corrock*, 9 Ves. 182; *Peacock v. Monk*, 2 Ves. sen. 190, where lord Hardwicke decided that the wife's separate real property was not bound. And see also *Hearle v. Greenbank*, 1 *Ibid*, 298, 303; and *Paulett v. Delaval*, 2 *Ibid*, 668, 669.

(9.) In this case, assuming the debt to have been Mrs. Hedden's, the complainant took from her a mortgage on the property and Williams's bond. No obligation to pay would rest upon a *feme sole* borrowing money, and thus securing it; and Mrs. Hedden can be no worse off than if she had been *sole*.

The whole mortgage was given in the state of New-York; and without an express covenant to pay, or a bond, the mortgagee is confined to the lands mortgaged for his remedy: *Salisbury v. Phillips*, 10 *John*. 57; 1 *Rev. Statutes of N. Y.* 738, s. 139, declaring the law, and extending it to grants.

The loan here was on the credit, solely and exclusively, of the mortgaged premises. And the authorities on the ques-

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tion are decisive, that you cannot imply an intention to charge one property, where there is an express intent shown to charge other property. See 2 *Roper*, 236, 7; and the annuity cases before cited, in 2 *Ves.* 138, and 9 *Ibid*, 486.

Here it is precisely as if Mrs. Hedden had taken a deed of the lot to her trustee, subject to a prior mortgage.

No case has ever charged a married woman with an implied assumpsit of a debt; still less of a debt previously contracted. Such was this debt, as indisputably proved by the answer and testimony. Instead of its being proved that the loan was made on the credit of Mrs. Hedden's separate estate, the contrary is proved, that it was a loan for speculation.

On no ground of principle, on no adjudged case, on no authority of text books or treatises, can this claim be maintained. There is not even a *dictum* in its favor, in the numerous reported decisions on the subject.

V. It is a maxim of this court, that he who seeks equity must do equity, and the court will not lend its aid upon any other terms to a party invoking it. See *Rogers v. Rathbun*, 1 *John. C. R.* 367; *Fanning v. Dunham*, 5 *Ibid*, 142; *Livingston v. Harris*, 3 *Paige's R.* 532.

The complainant has gone into possession of the lot mortgaged, which is proved to be worth more than the whole sum due to him, after deducting the rents he has received.

He claims to have foreclosed, and that he can call upon Mrs. Hedden for a deficiency of four or five thousand dollars, and retain the lot also. His foreclosure, as proved, is an *ex parte* proceeding, unknown to the law of this state. And what is more essential, he has omitted to allege in his bill, and to prove, that he has thereby cut off the equity of redemption.

The court, in so oppressive a case as this is, if sustained, will gladly lay hold of this circumstance to do exact justice, and will give to Mrs. Hedden an opportunity to redeem the premises, as a condition of subjecting her to the liability claimed by the bill.

The complainant will ask nothing more, if his object is to

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obtain his debt, with the interest, and not to compass an unrighteous speculation.

VI. The bill should be dismissed with costs.

If, however, the court shall decide against the defendant throughout, the proper decree will be for an account of the amount due, which was advanced for the benefit of her separate estate, and of the property which she had at the commencement of the suit, which was her separate estate when the mortgage was executed.

THE CHANCELLOR. By an ante-nuptial deed, dated May twenty-sixth, eighteen hundred and twenty, between the defendant, then Frances Susannah Watkins, of the one part, and Zadock Hedden, her intended husband, of another part, and Joseph Watkins Bostwick, of the third part; wherein it is recited, that the said Susannah and Zadock had mutually agreed that the said Zadock should not interfere or meddle with her present or future acquired property, whether real or personal; and that the said Susannah should be permitted to make what disposition of the said property she might choose; the said Zadock covenanted that he would not intermeddle with the then present or future acquired property, whether real or personal, of the said Susannah; and that she might have the absolute control over the said property, and dispose of the same by deed, will, or otherwise, at her pleasure. And the said Susannah, by and with the consent of the said Zadock, thereby released, assigned and transferred to the said Joseph Watkins Bostwick, his heirs and assigns, all her real and personal estate whatsoever, and wheresoever the same might be, in trust, to permit her, the said Susannah, to receive the rents and profits thereof to her own use, as the same should from time to time accrue and be receivable, and to devise the same by any will or testament she might choose to make; and further in trust that the said Joseph should and would, at her request, convey the said estates and property to such further and other uses as she might by writing under her hand and seal, direct and appoint.

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After the execution of the deed, the marriage was duly solemnized between the parties, then resident in this state.

On the first of May, eighteen hundred and thirty-seven, Robert M. Williams, the son-in-law of Mrs. Hedden, and who had before then become her trustee under the ante-nuptial deed, by a declaration of trust, reciting that certain leasehold premises in the city of New-York had been conveyed to him, but the purchase money thereof paid by Mrs. Hedden, out of her separate estate held under the trust deed, declared that he held the said leasehold premises in trust for her, pursuant to the terms of the deed.

Previously to this time, Robert M. Williams had incumbered the premises by a mortgage executed to the complainant, on the first of June, eighteen hundred and thirty-five, for four thousand five hundred dollars; and by another mortgage to the complainant, on the third of August, eighteen hundred and thirty-five, for one thousand dollars. In August, eighteen hundred and thirty-nine, the lease of the premises having expired, a new lease of the same was taken by the said Williams, by consent of Mrs. Hedden, and a new declaration of trust executed by him to her, declaring that he held them in trust for her, and without any individual interest in himself, reciting that the premises had for some years belonged to her, and were purchased out of her separate estate.

On the same day, by her appointment duly signed and sealed, reciting that Williams held the premises in trust for her, and that she was indebted to the complainant in the sum of five thousand five hundred dollars for money by him theretofore loaned to her, "for the purpose of securing to the said Richard Leaycraft the repayment of the said sum of money, with the interest to grow due thereon," she directed and empowered her trustee to execute to the complainant a bond for the said sum of money; and as a further security, to make, execute and deliver to the said Richard Leaycraft a mortgage upon the said premises. In pursuance of this appointment, Williams executed to

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the complainant the bond and mortgage now the subject of this controversy.

On the seventh of October, eighteen hundred and forty-one, the premises were sold under the mortgage last mentioned, pursuant to the statute of New-York, and bought by the complainant for three thousand dollars.

For the residue of the mortgage money, the complainant now files his bill and seeks to compel the payment of it by the defendant.

The husband of the defendant is deceased, the trust surrendered, and she alone is made party defendant.

In her answer, the defendant denies that the premises were purchased with her money, or that she ever borrowed any money of the complainant upon those premises. She denies that the first declaration of trust was made by reason of her having been the purchaser; but that Williams, having become indebted to her in the sum of one thousand dollars, for money lent by her to him, the first declaration was made to assign to her the leasehold property, to secure in whole or in part the money so lent to Williams; that the recitals therein were false and fraudulent, and unknown to her.

There is a conflict between the allegations of the answer and the testimony, upon this point, without entering into which, I deem it sufficient in settling the facts upon which the case must rest, to inquire into the validity of the last declaration of trust, and the power of appointment made simultaneously therewith.

The defendant admits that the new lease was made by her consent, and for her benefit, but by the advice and influence of the complainant and her son-in-law, Williams; and that the declaration of trust was also made with her consent, and the deed of appointment executed by her; but that the recitals therein were false, and unknown to her, she confiding in them and signing and accepting any paper that her trustee requested.

In reply to this, it is alleged and appears, that the declaration

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and appointment were drawn by Nicholas Dean, at the request of Mrs. Hedden, and subscribed by him as a witness, and according to his testimony, that no unfair means were used to procure her execution of the appointment; and that both papers were put on the record by him, at her request; but he does not remember whether they were read over to her or handed to her to read before execution.

The deed of appointment was acknowledged by the defendant, and the declaration of trust by Williams, before a commissioner of deeds, according to the statute of New-York, on the same day, the twenty-fifth of September, eighteen hundred and thirty-nine, and both placed upon the record at the same time.

It would hardly do to stamp this transaction with fraud, and to involve in its turpitude, the complainant, the scrivener and the trustee, who was the confidential friend and son-in-law of the defendant. They told her that the papers were correct and proper to carry out the arrangement to which she had agreed, and from which she was to derive a benefit; and they unquestionably were so.

She intended to have the lease renewed for her own advantage, and to assume the payment of the prior incumbrance; and even if the recital of her prior indebtedness to the complainant for money loaned to her, were false, yet there was sufficient inducement and consideration for her to direct the bond and mortgage to be made to the complainant.

It is probable that she supposed the premises sufficient to satisfy the mortgage; and when she suffered herself to be persuaded to direct its execution, if there were no fraud or undue means used, she became as much indebted to the complainant, as if she had originally directed the money to be borrowed.

I must therefore regard the declaration of trust, the deed of appointment, and bond and mortgage, as duly executed.

The question then is, were they so made under the antenuptial deed as to charge the separate estate of the defendant other than the mortgaged premises?

[Leaycraft v. Hedden.]

One of the most vexed and embarrassing questions raised in the court of chancery, is that which relates to the power of disposition by a *feme covert* of her separate estate.

On the one hand it has been held that a *feme covert* is to be regarded in equity as a *feme sole*, with respect to her separate estate, with power to dispose of it at her pleasure, without the consent of her trustee, unless specially restrained by the instrument under which she acquires the estate. On the other, that she is to be considered *feme sole*, to the extent only of the power given to her by the marriage settlement; that her power of disposition is not absolute, but *sub modo*, to be exercised according to the mode prescribed in the instrument under which she acquires the estate.

Accordingly, in support of the first proposition, we find, that as early as the case of *Norton v. Turvill*, 2 P. Wms. 144, decided by the master of the rolls in seventeen hundred and twenty-three, it was held, that although a bond made by a married woman was void, and not actionable at law, yet the demand could be supported in equity, so as to charge her separate estate. The execution of the bond was regarded as an appointment, disposing of so much of the estate.

This case was followed by a series of decisions of the succeeding chancellors, in accordance with it, to the year seventeen hundred and ninety-three, with the single exception of that of lord Bathurst; who dismissed the bill in the case of *Hulme v. Tenant*, reported in 1 Bro. C. C. 16.

On a re-hearing of the case, lord Thurlow sustained the bill, which was filed to charge the separate estate of a married woman, consisting of freehold and leasehold estates conveyed to trustees, to receive the rents and profits to her separate use, and to convey the estate to such use as she should appoint by deed or will under her hand and seal, or in default of appointment, to her heirs and executors. The husband had borrowed the money, and he and his wife joined in two bonds to secure its payment. On an examination of the cases, his lordship concluded that the proper rule was laid down in *Peacock v. Monk*, 2 Ves.

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sen. 190, decided by lord Hardwicke in seventeen hundred and fifty-seven; "that a *feme covert* acting with respect to her separate property, is competent to act in all respects as if she were *feme sole*."

In *Peacock v. Monk*, here referred to, lord Hardwicke said, that as to personal estate, where there is an agreement between husband and wife before marriage, that the wife should have to her separate use the whole or a particular part of her personal estate, she may dispose of it by an act in her life, or by will, as she pleases, although nothing is said of the manner of disposing of it.

In *Pybus v. Smith*, 3 Bro. C. C. 340, by lord Thurlow, in seventeen hundred and ninety-one, the same doctrine was held; and it was there added, that, "if a parent wished to give a portion to his daughter in such way that she could not aliene it, he saw no reason why it could not be done. But such intention must be expressed in clear terms."

In the year seventeen hundred and ninety-three, the court, observing the facility with which married women charged their separate estates for their husbands, with a desire to protect them, endeavored to restrain the power. And in *Sockett and Wife v. Wray et al.*, 4 Bro. C. C. 483, sir R. Pepper Arden refused to sanction a transfer to the husband of the property of the wife, held in trust, to pay her the interest during her lifetime, and after her decease to such person as she should by deed from time to time or by will appoint. He said there was a restraint in the case, and she could only dispose of it by a revocable act, a will.

The rule, after this, seemed to be unsettled and fluctuating, when considered in the cases that follow, viz.; *Hyde v. Price*, 3 Vesey, 437; *Milnes v. Busk*, 2 Vesey, 488; *Whistler v. Newman*, 4 Vesey, 129; *Mores v. Huish*, 5 Vesey, 692; *Sperling v. Rochfort*, 8 Vesey, 164; *Rich v. Cockell*, 9 Vesey, 369; *Jones v. Harris*, 9 Vesey, 497.

And the rule so remained unsettled, until lord Eldon, in *Parkes v. White*, 11 Vesey, 209, declared that it was important that the question should be settled once for all; that his mind

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was in great distraction on the subject; and added, "if it be asserted that lord Thurlow, following his predecessors as far back as the doctrine can be traced, repeatedly decided upon this principle, and that the court has now a right to refuse to follow it; I am not bold enough to act upon the assertion." He placed the case upon the principle of *stare decisis*, and went back to the old rule. And the cases which have since arisen in England, have followed the same rule.

In the *Methodist Church v. Jacques*, 3 *John. Chan.* 113, after a very elaborate review of the English decisions, chancellor Kent concluded, that they were so floating and contradictory as to leave him at liberty to adopt what he considered the true rule of these settlements. That instead of holding that the wife is a *feme sole* to all intents and purposes, as to her separate estate, she ought only to be deemed a *feme sole sub modo*, or to the extent of the power clearly given by the settlement.

This case was reviewed in the court of errors, and the decree reversed, and the English rule adopted. Mr. justice Platt, in delivering the opinion of a large majority of the court, comes to the conclusion, that the *jus disponendi* of a married woman over her separate property by virtue of the deed of settlement, (by which the property was held in trust to permit her to hold and enjoy the same, and to receive the rents, not subject to the control, debts or intermeddling of her husband, but to her only use, benefit and disposal,) was absolute and entire; and that she was competent to dispose of it, not only for her own use and pleasure, but could give it to her husband in such manner as she might have done if he had not been her husband; with the difference only, that as between husband and wife, courts will scrutinize the transaction with a jealous eye, in order to protect the wife from undue influence.

In *Ewing v. Smith*, 3 *Dess.* 447, chancellor Dessausure, after reviewing with great care all the English authorities upon this question, says, "The result then is, that a *feme covert* entitled to a separate estate in possession, remainder or reversion,

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is held to be a *feme sole* to the extent of her separate property, and the *jus disponendi* follows of course."

But the opinion of this learned chancellor shared the same fate with the opposite opinion of his erudite brother of New-York, and was reversed in the appellate court.

In *Lancaster v. Deland*, 1 *Rawle*, 231, the wife having a separate real estate for her sole use for life, with no clauses restraining her disposition of it, mortgaged it with her husband, the mortgage reciting that it was for their joint debt. The court decided against the charge, and held that a *feme covert*, in respect of her separate estate, is to be deemed a *feme sole* only to the extent of the power clearly given by the instrument by which the estate is settled, and has no right of disposition beyond it.

In *Morgan v. Elam*, 4 *Yerger's Term Rep.* 375, (in eighteen hundred and thirty-three,) it was held that the power of a married woman over her separate estate does not extend beyond the plain meaning of the deed creating the estate, and she is, therefore, to be considered a *feme sole* in relation to the estate only so far as the deed has expressly conferred on her the power of acting as a *feme sole*. And when a particular mode or manner is pointed out for the disposition of the separate estate of a married woman, she cannot dispose of it in any other way.

Judge Green, on page 445, remarks, If these marriage settlements are supported according to their plain sense and the manifest intention of the grantor, it is a mockery to talk about supporting a conveyance, and at the same time give it such construction as will allow a disposition to be made of the estate which it was the manifest intention of the grantor to guard against.

I am not aware that this question has ever been judicially considered in New-Jersey; and in the midst of such a conflict of opinions, it is clear that we are left to the determination of it upon what may appear to be sound principles of equity.

And I think it may safely be said, that a *feme covert* is a *feme sole* as to her separate estate, so far as to dispose of it, in any way, not inconsistent with the terms of the instrument

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under which she holds. Any danger apprehended from such rule, can be avoided by words restraining the disposition, or directing the precise mode in which it may be made.

If by the deed the husband has relinquished any right which he might have acquired in the estate by the marriage, and covenanted not to intermeddle therewith, but to permit the wife to dispose of it by deed, will, or otherwise, at her pleasure, her right of disposition remains as it was before the marriage, and then she is, in respect of the estate, *feme sole*. But if the terms of the deed require a particular mode of disposition, then as clearly those terms must be observed; her power is limited by them, and she is *feme sole sub modo*, and only to the extent of the power expressed.

This brings us, necessarily, to the consideration of the antenuptial deed, and whether its terms have been violated by the transactions between these parties.

Upon due consideration, I am satisfied that the deed of appointment, and the bond and mortgage executed in pursuance of it, are not inconsistent with the terms of the deed of trust; on the contrary, that the terms of that deed are sufficiently broad to cover both the rules contended for. By its express terms, the trustee covenanted among other things, to convey the said estates and property to such further and other uses, as she might, by writing under her hand and seal, direct and appoint. The defendant, by writing under hand and seal, duly executed, appointed and directed her trustee to execute the bond to the complainant, to secure the money due to him, and which she, at least, agreed to pay. As a further security, she directed him to execute a mortgage upon a certain part of her estate, which has since been exhausted, and for aught that appears, without fraud; but most unfortunately for the defendant, at a time when property was so depreciated, that a large residue of the amount secured by the bond is unpaid.

The only question is, was the bond so executed by the trustee, a conveyance, within the terms of the deed, of so much of her separate estate as should be necessary to pay it?

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The term convey, although usually applied to real estate, is very comprehensive in its meaning, and implies a transfer, and assignment of personal property also.

By reference to the recital in the deed, and the covenant of the husband, we are enabled to see more fully in what sense the parties thereto understood it.

In the recital it appears that the parties had mutually agreed, that the intended husband should not interfere or meddle with her present or future acquired property, whether real or personal, and that the defendant should be permitted to make what disposition of the said property she might choose. And her intended husband covenanted that she might have the entire and absolute control over it, and dispose of the same by deed, will or otherwise at her pleasure.

The intention of the defendant, and of the person next most interested, was that she should have the absolute control of the property, and dispose of it at her pleasure. To carry out this intention, the trustee covenanted to convey the said estates and property as she should direct. The term convey must have been used as well in reference to the personal as to the real estate. And the direction to execute a bond, may in equity be regarded as an appropriation of so much of the estate as is necessary to pay it.

If there were a doubt upon this construction, the strong equity of the case would solve it. If the complainant forebore to the defendant money due to him, at her request, and as she thought for her benefit, common justice and equity demand that she should pay it.

I feel safe, therefore, in the conclusion, that pending the trust her separate estate might rightly have been charged with the amount of money due on the bond, but that she could not have been made personally liable.

The trust is now surrendered, and her separate estate held with her general property, and no means of distinguishing it is afforded to the court; and I can see no reason why a general decree of payment should not be made.

[Learycraft v. Hedden.]

Let the matter be referred to a master, to ascertain the amount yet due on the bond, to the end that the defendant may be decreed to pay the same, with costs.

Order accordingly.

MARTHA J. EVERLY v. JOHN P. RICE.

To entitle a defendant to the dissolution of an injunction, he must deny the whole equity of the bill upon which the injunction is based. He must answer directly and without evasion, and must not merely answer the several charges literally, but he must traverse the substance of each charge.

Where there are particular charges, they must be answered particularly and precisely, and not in a general manner, though the general answer may amount to a full denial of the charges.

The defendant must answer upon his own knowledge, and not upon information and belief; otherwise the injunction must be retained till the final hearing.

HEARING upon motion to dissolve an injunction, upon the ground that the whole equity of the bill was denied by the answer.

Jeffers, for defendant, in support of the motion.

Vroom, for complainant, contra.

THE CHANCELLOR. The complainant filed her bill in this court for an injunction to stay a sale of real estate, and therein states, that her son, Miller N. Everly, on the twelfth of June, eighteen hundred and thirty-nine; made his bond and mortgage to the defendant, on certain premises in Camden, to secure the payment of eleven hundred dollars.

That in April, eighteen hundred and forty-two, Thomas Diehl and Cecelia Hampton, claiming title to the said mortgaged premises, brought an action of ejectment, to recover the

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possession thereof, in the circuit court of the county of Gloucester. That on the tenth of July, eighteen hundred and forty-two, the defendant, Rice, filed his bill in the court, upon the said bond and mortgage, for foreclosure and sale of the mortgaged premises.

That on the tenth of August, eighteen hundred and forty-two, Miller N. Everly contracted with the complainant in this suit, to sell to her, all his right and interest in the said premises, and on the fifth of November following actually conveyed the same to her by deed.

That on the twelfth of August, eighteen hundred and forty-two, after the contract for the conveyance of the interest of the said Miller N. Everly to the complainant, and before the actual conveyance of the same, the complainant, fearing a loss from the sale of the mortgaged premises, under a decree of sale, pending the said action of ejectment, by her attorney in fact, Miller N. Everly, proposed to the attorney at law of Rice, that if he, Rice, would stay the proceedings upon the suit then pending in this court, on the bond and mortgage, until after the trial of the said action of ejectment, she would execute to him her bond and warrant of attorney to confess judgment for eleven hundred dollars, to be entered up against her in Philadelphia, as collateral security for the payment of the mortgage money. That this proposition was accepted, the bond and warrant of attorney executed and the judgment entered up.

That before the trial of the action of ejectment, the defendant, in violation of the agreement, proceeded in his suit in this court, obtained a decree of sale at the October term, eighteen hundred and forty-three, and sued out an execution, and was proceeding to sell the said mortgaged premises on the twenty seventh of January last, to the irreparable injury of the complainant.

Upon this bill an injunction was granted on the twenty-fourth of January, eighteen hundred and forty-four, to stay the sale.

The defendant has filed his answer, and now moves at the earliest day to dissolve the injunction.

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If the allegation in the bill be true, the injunction was properly granted, and must be continued.

To entitle the defendant to an order for dissolution, he must deny the whole equity of the bill on which the injunction is based ; he must answer directly and without evasion, and must not merely answer the several charges literally, but he must traverse the substance of each charge. Where there are particular charges, they must be answered particularly and precisely, and not in a general manner, though the general answer may amount to a full denial of the charges: *Mitford on Pleading*, 250 ; 2 *Eq. Ca. Ab.* 67. See *Ca. in Chan.* 53.

The complainant's equity rests upon two grounds.

First, her equitable interest in the premises, by virtue of the contract for sale to her.

And secondly, the agreement, upon an adequate consideration, to stay the proceedings in chancery ; which was obligatory upon the defendant, although made by his attorney.

Does the defendant fully, particularly and substantially deny these allegations ?

To the first he answers, that he has no knowledge of any such contract of conveyance, nor does he admit that any such contract ever existed ; that the said Miller N. Everly now claims the rents, and that if the complainant has any such deed of conveyance it is fraudulent and void, and in violation of the bankrupt law, and does not give any title to the complainant to come into this court to stay proceedings.

Now here is a distinct allegation in the bill, upon which the complainant's equity is partly founded, not directly denied by the answer.

It is possible that the defendant may overcome this, by such a denial of the other allegation, as to show that whatever interest the complainant may have had in the premises, she can have no equity as against him.

The important inquiry, then, is upon the second point.

To this part of the bill the defendant answers, that various propositions were made by Miller N. Everly to himself and to

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his attorney, and among others to give his mother's, the complainant's, bond and warrant of attorney to confess judgment for eleven hundred dollars, as collateral security for the mortgage money, upon condition that he would release the personal property of Miller N. Everly from sale upon an execution issued upon a judgment at law upon his bond to Rice. That the bond and warrant of attorney was executed, and judgment entered upon it, as he is informed and believes, with a stay of execution for one year, but no written agreement was entered into or signed by this defendant; and he is informed and believes that no agreement was signed by his attorney, except a release of the personal property of the said Miller N. Everly. That he never saw the complainant, nor made any agreement with her; and that he believes his attorney never saw her. That he understood that Miller N. Everly produced the bond and warrant of attorney, and that the judgment was entered up as collateral security, if he failed to make his mortgage money in New-Jersey; and that he was to proceed with his suit of foreclosure and sale, according to the regular practice of this court.

This answer is manifestly indirect and evasive. It may all be true, and yet no allegation of the bill denied. It may be true that no written agreement was signed either by the defendant or his attorney, and yet an agreement made precisely as stated in the bill. He may never have seen Mrs. Everly, and yet an agreement may have been made between the attorneys. A contract, as stated, may have been made, and yet the defendant have been informed and made to believe otherwise.

The defendant further denies, that any such agreement was made, or that the complainant or Miller N. Everly has produced, or can produce, any such agreement or deed.

In common charity it is to be presumed that this general denial relates to a written agreement or deed, which is not alleged in the bill, or else that it is predicated of the defendant's information and belief, which is not sufficient.

The defendant must answer upon his own knowledge, and

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not upon information and belief, otherwise the injunction must be retained till the final hearing.

In *Roberts v. Anderson*, 2 *John. Chan.* 204, where fraud was alleged between other persons than the parties in the bill, and the defendants denied any knowledge or belief of the fraud, chancellor Kent said, "It is true the defendants may have given all the denial in their power, but fraud may exist notwithstanding; and consistently with their ignorance and the sincerity of their belief. The case does not fall within the reason of the general rule, that the injunction is to be dissolved when an answer comes in and denies all the equity of the bill."

The same rule was recognized in *Ward v. Van Bokkelen*, 1 *Paige*, 100; and in *Kinnaman v. Henry*, decided in this court in eighteen hundred and seventeen, chancellor Williamson said, "I do not consider the fraud in this case as sufficiently denied, to entitle the defendants to a dissolution of the injunction, upon the ground of the whole equity of the bill being denied. The defendants are not charged as being parties or privies to the fraud, and therefore it is impossible, in the nature of things, if they were not privy to it, that they should be able positively to deny the fraud. All they could do, or which they have done, is to deny all knowledge or belief of the alleged fraud. The answer may be perfectly true, and yet Johnson the mortgagor, guilty of the fraud imputed to him, and the complainant entitled to relief against these defendants. Such an answer is not a sufficient denial of the complainant's equity to entitle the defendants to a dissolution of the injunction."

Upon principle, as well as upon authority, I feel constrained to recognize the same rule, and to refuse the motion to dissolve.

CASES
ADJUDGED IN
THE PREROGATIVE COURT
OF THE STATE OF NEW-JERSEY,
OCTOBER TERM, 1844

In the matter of the Administration Bond of EDEN S. WEBSTER, Administrator of JOHN S. WEBSTER, deceased.

The prerogative court will, in a summary manner, upon mere motion, inquire into the validity of an order previously made by the ordinary for the prosecution of an administrator's bond.

The validity of the order cannot be inquired into by the court in which the action is brought upon the bond.

The usual and proper practice on applications to the prerogative court, is to proceed by petition, duly verified, setting forth the facts upon which the application is founded; but the court will not, for the mere want of a petition, set aside an order otherwise regular.

It must appear that an order for the prosecution of an administrator's bond was made at the request of a party aggrieved.

THIS was a motion to vacate an order made by the ordinary, for leave to prosecute an administrator's bond. The order bore date on the sixteenth of February, eighteen hundred and forty-three, and was filed in the prerogative office on the tenth of June, eighteen hundred and forty-four. The order was as follows: "Upon the request of Felix Handequin, let the administration bond within named be prosecuted, and the moneys recov-

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ered, applied in the manner directed by law." The only papers appearing to be on file with the order, are exemplified copies of the administrator's bond and oath of office, and a certificate of the surrogate of the county of Essex, that on the twenty-seventh of September, eighteen hundred and forty-one, Eden S. Webster, administrator of John S. Webster, deceased, filed in the office of the said surrogate, an inventory of the personal estate of the said intestate, amounting to the sum of one thousand six hundred and ninety-nine dollars and seven and a half cents, since which nothing appears of record in reference to the estate of the said John S. Webster, deceased.

The reasons relied on for vacating the order, appear in the opinion of the ordinary.

Vroom, for William Webster, the security on the bond, in support of the motion.

R. Vanarsdale, contra.

THE ORDINARY. This is an application upon notice, on behalf of William Webster, the security of Eden S. Webster, the administrator, to set aside the order for prosecution of the bond, made by the ordinary on the sixteenth of February, eighteen hundred and forty-three, for the reasons hereinafter mentioned.

On behalf of Felix Handequin, upon whose request it is alleged the order was made, it is here objected that the court has no right in this summary manner, upon mere motion, to inquire into the validity of the order.

The granting of such order rests somewhat in discretion; so much so at least, that it cannot be assigned for error, nor made the subject of review in an appellate court.

Nor can it be inquired into by the court before which the action is brought upon the bond, further than to ascertain whether an order has in fact been made, and its terms complied with: *Dickerson v. Miller*, 1 *Green*, 3.

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The order then must either be conclusive, although it may have been improvidently granted, or obtained upon false suggestion, or else it must be subject to inquiry before this court.

I am satisfied, therefore, that the inquiry should be made here, and that the mode proposed is as convenient and safe as any other.

The first reason assigned for setting aside the order is, that no petition was filed.

The proceedings in the prerogative court are after the manner of the civil and common law ; and the usual practice is, to file a petition setting forth the facts upon which the application is founded, with proper verification. Such practice has been found very convenient and proper, and affords the party defendant, and others interested, an opportunity at all times of seeing upon what grounds and on whose behalf the bond is prosecuted. But I have found no rule so imperative, nor any practice so uniform and inveterate, that the judge of the court may not dispense with that form of application, provided sufficient reasons for the prosecution are substantially laid before him ; nor am I willing, for the want of a mere form, to set aside the order.

Again, it is objected that the application was not verified.

It is true, there is no oath of the party, or other person, to be found among the proceedings ; but there is an exemplification of the administration bond, with the certificate of the surrogate annexed, by which it appears that the bond was executed on the twenty-seventh of September, eighteen hundred and forty-one, and the inventory filed on the same day, from which time to the twenty-seventh of February, eighteen hundred and forty-three, the date of the certificate, there was nothing on record, or among the files of his office, in reference to the estate of the deceased.

The application must have been founded upon the fact, that the administrator had not made or caused to be made, "a just and true account of his administration within twelve calendar months" from the date of the bond ; and the documents filed here are sufficient evidence of that fact. The court having

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been satisfied that this was such forfeiture as subjected the obligors to the penalty of the bond, I cannot, for this reason, set aside the order.

The third objection, that no bond was filed to indemnify the ordinary against costs, could be overcome by filing such bond before any further proceedings be had in the suit.

The fourth reason for setting aside the order, is, that it does not appear that it was made at the request of any party aggrieved, and I think the reason is sufficient.

The ordinary cannot at his will, direct the prosecution of an administration bond. It can be done only "at the request of any party grieved by such forfeiture:" *Elmer's Dig.* 167, sec. 12.

The name of the party, and how he is aggrieved, should be made to appear on the original application for the order, or at least upon the hearing of the motion to set it aside.

It cannot be shown at the trial upon the bond. All that can be proved there is the execution of the bond and its forfeiture. The recovery is for the penalty, and by execution that amount may be brought into this court to be applied towards making good the damages sustained by not performing the condition of the bond, in such manner as the judge of the court shall, by his sentence or decree, direct. *Elmer's Dig.* 167; *Dickerson v. Robinson*, 1 *Halst.* 195; *Ordinary v. Hart*, 5 *Halst.* 68.

Unless, therefore, it be required to appear upon the application, *prima facie*, at least, that the party requiring the order for prosecution is aggrieved by the forfeiture, the administrator and his sureties are liable to be vexed with a prosecution at the suggestion of a party who may have no interest whatever in the estate; and that, possibly, upon a mere technical forfeiture, where there may have been some unavoidable delay, but no injustice done to any.

It was alleged, indeed, upon the argument, that Handequin is a creditor, and had commenced his action at law against the administrator; but this rests entirely in allegation, and

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the fact of his being a creditor is as confidently denied by the other party.

This is so important a fact to be presented and verified, that I feel constrained, for the want of it, to set aside the order.

Upon the argument another reason was assigned, not contained in the notice, namely, that the order was granted on the sixteenth of February, eighteen hundred and forty-three, and that the papers and order were not filed until the tenth of June, eighteen hundred and forty-four.

This may have greatly embarrassed the defendants in the suit, and has not been without some influence on my mind. The papers and order should have been filed immediately upon the granting of the order. And although no direction for filing is expressed in the order, yet it must be regarded as necessarily implied; and it may be questioned whether the party withholding the order for so long a time, has not waived it, or failed to comply with its terms.

Yet, as it is now actually on file, and as no prejudice appears to have arisen from the omission, I do not deem it necessary to put the question of vacating upon that point.

For the fourth reason, let the order to prosecute be set aside and vacated.

Order accordingly.

RULES

OF THE

COURT OF ERRORS AND APPEALS.

RULE I.

The court shall meet at ten o'clock in the forenoon of the first day of every term, and at the same hour in the forenoon of every day in the term, unless otherwise ordered.

RULE II.

The clerk shall enter in the minutes the names of the members who shall be present at each session of the court during the term.

RULE III.

On the opening of the court in the morning of the first day of each term, the presiding officer shall inquire if any person has any motions for rules or orders, or other special applications, to make to the court; and so much of said day shall be appropriated to the hearing of such matters as may be necessary; but no such motions or applications shall be heard at any other day in term, without the special permission of the court.

RULE IV.

As soon as such motions and special applications have been disposed of, the presiding officer shall take up the list of causes; and they shall be brought on in the order in which they stand upon the list, unless otherwise ordered by the court.

RULES OF THE

RULE V.

All causes, whether on appeal or writ of error, may be brought on and heard upon twenty days' notice thereof in writing, given by either of the parties to the other, and on filing a copy or abstract of such notice in the office of the clerk, at least five days previous to the first day of the term at which such cause is to be set down for hearing.

RULE VI.

All causes shall be noticed for hearing on the first day of the term, if at issue long enough to admit of such notice; if not, then for as early a day in term as circumstances will permit.

RULE VII.

All causes noticed for hearing or argument shall be set down by the clerk upon the calendar, or list of causes, in the following order, that is to say: writs of error shall have precedence according to the term to which they were made returnable, without regard to the time at which they were actually returned; and appeals shall have precedence according to the time of filing the petition of appeal in this court.

RULE VIII.

If two or more writs of error shall have been made returnable to the same term; or if two or more petitions of appeal shall have been filed at the same term, they shall be set down on the list, and have priority, according to the time of filing the notices of hearing.

RULE IX.

It shall be the duty of the clerk to furnish the court, on the opening thereof on the first day of each term, with a list of causes noticed for hearing, in the order in which they shall be entitled to be heard according to these rules.

RULE X.

Necessary papers in the cause shall be read w

2. After which, one of the counsel for the appellant, or plaintiff in error, shall open the cause; then two counsel for the opposite party may be heard in answer, and one counsel only for the opening party shall be allowed to reply: but in case of an appeal from an order or decree of the court of chancery in a cause where there are several defendants who have separate and distinct interests, and who have different counsel concerned for them, the counsel for the respective defendants shall be heard in such order as the court may direct; but not more than two counsel shall be allowed to argue for any one defendant: and if more than two counsel answer for the defendant, in that case two counsel may be heard in reply.

3. On all arguments arising incidentally before the court, or not before provided for, one counsel shall be heard in opening the matters in question or points, then two counsel for the opposite party may answer, and one counsel only for the opening party shall be allowed to reply.

R U L E X I.

Each member of the court shall, previous to the hearing of an appeal or argument of a writ of error, be furnished with a state of the case, or an abridgment of the pleadings and proofs, and of the petition of appeal, or the record and assignment of errors (as the case may be) in the cause, to be mutually agreed upon by the parties, or their counsel, in case they can agree upon the same, and also with the points upon which the parties respectively mean to rely; and in case the parties shall not agree upon a state of the case, or an abridgment as aforesaid, then such case or abridgment shall be made by the party who sets down the cause for hearing or argument, and signed by at least one counsellor at law, and a copy thereof furnished to each member of the court and to the adverse party; and in that case each party shall furnish, as last aforesaid, the points upon which he means to rely.

R U L E X II.

Hereafter, in all cases of appeals from any order or decree of the court of chancery, the party appealing shall file with the

clerk of this court a petition of appeal, in which shall be briefly stated the order or decree complained of, and the grounds of appeal, and shall serve a copy thereof on the solicitor of the adverse party, if he has a solicitor, or if he has not, then on the adverse party, if to be found in this state, within thirty days after filing the said petition; and shall also, within the same time, deposit with the clerk in chancery one hundred dollars, to answer the costs of the appeal, if the appellant shall not prosecute the same to effect; and in default of serving a copy of the petition and making such deposit as aforesaid, proceedings may be had on the order or decree appealed from, as if such appeal had not been made; and the said appeal may be dismissed by this court with costs.

R U L E X I I I .

Whenever a deposit shall be made, as aforesaid, with the clerk in chancery, he shall, with all convenient speed, cause copies of the several orders and decree in the case to be made at the expense of the appellant, (who shall be liable for the same in the first instance,) and deliver the same, with all the pleadings, depositions, exhibits, and papers, which may have been filed in his office relating to the cause, to the clerk of this court; and the said deposit shall be subject, prior to any other lien, to the fees of the clerk in chancery for the said copies.

R U L E X I V .

The respondent shall file an answer to the petition of appeal within thirty days after service of a copy of the said petition and making the deposit aforesaid; and in default thereof, the appellant may enter a rule as of course, in vacation or term time, with the clerk of this court for the hearing of the said appeal, and may bring on the same, by giving and filing notice thereof, as hereafter mentioned.

R U L E X V .

If the respondent shall file an answer to the petition of appeal, the cause shall then be considered at issue, and either party may enter a rule for the hearing as of course, as mentioned in the last preceding rule.

R U L E X V I.

The party prosecuting a writ of error, shall procure the same to be returned on the day in term, or the day after, to which it is made returnable, or show good cause why it is not returned, or on failure thereof, the said writ may be declared by this court null and void.

R U L E X V I I.

The plaintiff in error shall assign and file errors, and serve a copy thereof on the attorney of the defendant in error, if he has an attorney, or if he has not, then on the defendant in error, if to be found in this state, in thirty days after the writ of error shall be returned, with the transcript of the record or proceedings, unless diminution alleged; and then in thirty days after the return day of the certiorari; or, in default thereof, the plaintiff in error shall be non-prossed, unless this court shall see cause to allow further time.

R U L E X V I I I.

The defendant shall join in error within thirty days after the expiration of the time limited or granted for assigning, filing and serving errors, or the errors may be taken as confessed; and the plaintiff may enter a rule of course, either in vacation or term time, with the clerk of this court, setting down the cause to be argued ex parte.

R U L E X I X.

After joinder in error, either party may enter a rule for a concilium with the clerk of this court as of course, as before mentioned, and notice the cause for argument.

R U L E X X.

When a cause is regularly noticed for hearing, if the appellant or the plaintiff in error (as the case may be) shall not appear to argue the appeal or errors assigned, the decree or judgment of the court below shall be affirmed, with costs; and if the respondent or defendant fails to appear, the appellant or plaintiff may proceed ex parte.

RULES OF THE

R U L E X X I.

The states of the case, or abridgments of the pleadings and proofs, and of the petition of appeal, or of the record and assignment of errors, mentioned in the eleventh rule, shall be furnished by the appellant or plaintiff in error, and on failure thereof, the appeal or writs of error may be dismissed with costs.

R U L E X X I I.

If the plaintiff in error shall allege diminution of the record, it shall be done on the day the writ of error shall be returned, or within eight days thereafter; and he shall thereupon apply to the clerk of this court for a certiorari of course and without special order; and the plaintiff in error shall cause it to be duly returned within twelve days, or shall lose the benefit thereof, unless this court shall see cause to allow a further day for that purpose.

R U L E X X I I I.

All cases made and points prepared and furnished to the members of this court, shall be printed on good *foolscap* paper with a large margin, on which every tenth line shall be numbered; and the party who makes the case shall, at least twenty days before the first day of the term at which such cause shall be first noticed for hearing, serve upon the attorney or solicitor of the adverse party, or transmit to such attorney or solicitor by mail, directed to him at his place of residence, three copies of the case, for the use of such party and his counsel, or the party who ought to have served such case shall not have the right to bring his cause on to be heard, without the consent of the adverse party, until after the expiration of twenty days after such copy of the case shall have been served.

R U L E X X I V.

Orders to assign errors, to join in error, to file petitions of appeal, and to answer such petitions, may be entered at any time by the clerk of course, in the minutes of the court upon the written request of the solicitor, attorney, or counsel, at the peril of the party entering the same, with the like force and effect as if entered by direction of the court during its session.

* *Italic* rescinded October term, 1846.

R U L E X X V.

The parties to every cause, now or hereafter pending in this court, shall have the liberty of submitting printed, instead of oral arguments.

R U L E X X V I.

The remittitur in case of a writ of error shall contain a copy of the judgment of this court, annexed to the writ of error and the transcript of the record of proceedings, as brought into this court, under the seal of this court, and signed by the clerk thereof; and the remittitur in case of an appeal shall contain a copy of the decree or order of this court annexed to the petition of appeal, and the matters thereto annexed, as brought into this court under the seal of this court, and signed by the clerk thereof.

R U L E X X V I I.

No member of this court shall, as attorney, solicitor, or counsel, be concerned in or argue any cause in this court either upon error or appeal.

R U L E X X V I I I.

Special motions shall require a notice thereof, with copies of the papers not records of this court, to be served at least two entire days before the motion is made.

R U L E X X I X.

In cases of writs of error or appeals, the attorney on record or solicitor for the adverse party, if any, in the court below, shall be considered as attorney or solicitor, as the case may be, for the defendant in error or respondent in appeal; and notices and papers served on him shall be deemed good service, until the defendant in error or respondent in appeal shall give notice in writing to the plaintiff in error or the appellant in appeal that he has employed another attorney or solicitor, naming in such notice the attorney or solicitor employed, or until appearance entered by a new attorney or solicitor.

R U L E X X X.

When a motion or preliminary or interlocutory matter has been argued or submitted to the court, the presiding officer shall

distinctly state the point or points to be decided, and shall then inquire of the court whether it is ready to decide the question ; and if no objection is made by any member, the president shall ask each member his opinion, calling their names, and also expressing his own opinion, in such order as he may think proper, and shall then announce the decision, as the result may be ; but if any member, on the question being put as aforesaid by the president, shall request or propose that the court shall have a consultation on the matter, the counsel and audience shall withdraw ; and after the court shall have conferred and advised together of the matter, the doors shall be opened, and then the president shall, in manner aforesaid, call upon the members of the court for their respective opinions, and announce the judgment of the court in the matter, giving at the same time his own opinion thereon. The same course shall be pursued after the argument of a cause on the merits.

R U L E X X X I .

When the decision of a cause depends upon distinct questions, the decision of either of which will dispose of the cause, the question shall be taken separately, if required by any three members.

R U L E X X X I I .

Affidavits, to be used on any special motions or arguments in this court, shall be taken on four days' previous notice of the time and place of taking the same, at which time and place both parties may take affidavits. If such notice has not been given, no affidavit shall be read, unless a copy thereof has been served on the adverse party at least eight days before the first day of the term ; and in such case the adverse party may take and use on the argument counter affidavits taken without notice.

R U L E X X X I I I .

The rules of this court shall be considered as general rules for the government of the court and the conducting of causes ; and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the court in

any case where it shall be manifest to the court that a strict adherence to them will work surprise or injustice.

ADDITIONAL RULE,

Adopted July Term, 1846:

RULE XXXIV.

In the argument of any cause before this court, counsel shall be limited each to one ordinary sitting of the court, not exceeding three hours, unless for special reasons the court shall see fit to grant further time.



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A.

ACCOUNT.

Where an account has been settled by arbitrators, and a bond and mortgage given for the sum awarded to be due, the court will not, except in case of gross wrong, permit the account to be re-investigated, or the validity of the award to be contested. *Johnson's Ex'rs v. Ketchum*, 364

ADMINISTRATORS. Vide EXECUTORS AND ADMINISTRATORS.

ADMINISTRATOR'S BOND. Vide PREROGATIVE COURT, 4—7.

ADULTERY. Vide EVIDENCE, 8, 9.

AGREEMENT.

1. Equity will decree the specific performance of a *parol agreement* for the sale of land, if the purchase money has been paid, possession of the land taken by the purchaser, and improvements made thereon. *Casler v. Thompson*, 59
2. Where a party's residence is in one state, and his place of business in another, the presumption is that his contracts are made rather at his place of business than at his place of residence. *Varick's Ex'r v. Crane*, 128
3. In the absence of any direct evidence of the place in which the contract was made, the money advanced, or the papers delivered, the presumption obtains that the contract was made at the place where the person lives who is to receive the money, or where the contract is to be performed; and this presumption is not overcome by the fact that the obligee lived in another state, and that the bond and mortgage were made and executed, and the mortgage recorded there. *ib.*
4. If a contract is susceptible of two constructions, that should be adopted which will render it operative, rather than that which will render it void. *ib.*
5. The time specified for the payment of a bond may be enlarged by parol. *Vanhook v. McCarty*, 141

6. The specific performance of a contract will be decreed against a subsequent purchaser of the bargained premises having knowledge of the complainant's equitable title. *The New-Barbadoes Toll Bridge Co. v. Vreeland*, 157
7. If the contract is several, it is no ground of objection that the contract made by the complainant with divers defendants, be described in the bill of complaint as a contract between the complainant and defendant, without reference to the other parties. *ib.*
8. Mere lapse of time constitutes in itself no bar to a decree for specific performance. *ib.*
9. If the delay, under the circumstances, amounts to an abandonment of the contract, relief will be denied. *ib.*
10. Under an agreement made by a landholder with a turnpike company to grant land for the use of the road, upon condition that the road is located on a particular route, a covenant to grant so much land as the road should occupy, and to execute a good and sufficient deed for the same, will be construed to mean a deed in fee simple, and not merely for the term of the company's charter. *ib.*
11. Specific performance of a contract for the conveyance of land decreed after the lapse of twenty-three years, the vendee having been in possession. *ib.*
12. Where one party signs an agreement to do certain acts, after the other shall have performed on his part conditions which are precedent—the conditions being performed, equity will decree a specific performance against the party who signed the agreement. *Laning v. Cole*, 229
13. There is *mutuality* in the terms of such an agreement. *ib.*
14. Where one party only is bound by the contract, and nothing has been done under it, will equity decree a specific performance?—*Quere.* *ib.*
15. Premises purchased at sheriff's sale and conveyed to the purchaser under a parol agreement to permit the defendant in execution to redeem, ordered to be reconveyed. *Combs v. Little*, 310
16. If a contract for the sale of real estate is silent as to the kind of funds in which payment is to be made, and the vendor by her conversation at the time of executing the contract justifies a belief on the part of the vendee, that specie will not be demanded, this is a sufficient excuse on the part of the vendee for not tendering specie on the day specified for the payment. *Pickle v. Auble*, 315
17. Under such circumstances, a demand of specie on the day of payment by the vendor, and a refusal on her part to allow the vendee reasonable time to procure it, will not defeat the complainant's right to a specific performance of the contract, especially after his being in possession and making improvements on the property. *ib.*
18. Nor will the right of the vendee to a specific performance be defeated by his promise to accept a lease from the vender, under the

impression that his right to demand a deed was lost by the conduct of the vendor in demanding specie, and his inability to pay it. *ib.*

Vide HUSBAND AND WIFE, 1—4.

ALIMONY. Vide DIVORCE.

ANCIENT RIGHTS.

Public policy forbids the disturbance of rights ancient and well settled by the practice of the parties in interest. *Sheppard v. Hunt*, 277

ANSWER. Vide PLEADING, III.

APPEAL. Vide ORDINARY AND SURROGATES, 21. PREROGATIVE COURT, 1—3.

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ASSOCIATE REFORMED CHURCH. Vide RELIGIOUS SOCIETY.

ATTACHMENT (FOR CONTEMPT.) Vide PRACTICE, IV.

AWARD.

1. If arbitrators are not sworn, the whole proceeding is utterly void. *Combs v. Little*, 310
2. After an award has been executed, the court will not set it aside upon the ground that the arbitrators were not sworn. *Johnson's Ex'rs v. Ketchum*, 364
3. Where an account has been settled by arbitrators, and a bond and mortgage given for the sum awarded to be due, the court will not, except in case of gross wrong, permit the account to be re-investigated, or the validity of the award to be contested. *ib.*

B.

BANKS. Vide FRAUD, 1—3, 7.

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BONA NOTABILIA. Vide ORDINARY AND SURROGATES, 7.

BOND.

The time specified for the payment of a bond may be enlarged by parol. *Vanhouten v. McCarty*, 141

Vide HUSBAND AND WIFE, 10, 11. PREROGATIVE COURT, 4—7.

C.

CAVEAT.

1. A caveat is incident to all ecclesiastical courts, and prevents the case from being proceeded in without the caveator being heard. *Ex parte Courson*, 408

2. It is a general rule, that all persons who may be injured by admitting a will or codicil to probate, may caveat against it. *ib.*

CONSTITUTIONALITY OF LAWS. Vide PLEADING, 21.

CONTRACT. Vide AGREEMENT.

CORPORATIONS.

1. By the eighth section of the charter of "The Camden and Woodbury Railroad and Transportation Company," it is provided "that the said corporation shall pay or make tender of payment of all damages for the occupancy of the lands through which the said road may be laid out, before the said company, or any person in their employ, shall enter upon or break ground in the premises, except for the purpose of surveying said route, unless the consent of the owner or owners of such land be first had and obtained." By the ninth section of the charter it is further provided, "that in case the company and the owners of land cannot agree as to the price, commissioners shall be appointed to assess the value of the said land, and the damages sustained by the owner; and if either party shall feel aggrieved by the decision of the commissioners, such party may appeal to the court of common pleas of the county, who shall have power to hear and adjudge the same, and if required to award a venire for a jury before them to hear and finally determine the same." *Held*, that if the value of the land and damages be ascertained by commissioners, and an appeal be taken from their decision, the company cannot, pending the appeal, by tendering the amount awarded by the commissioners, acquire a right to enter upon the land, except for the purpose of surveying the route. *Browning v. Camden and Woodbury Railroad Co.* 47
2. The right to appeal from the decision of the commissioners is unconditional, and requires no cause to be shown. *ib.*
3. The very act of appealing, sets aside the report of the commissioners, and the question of the value of the land and damages is thereby left entirely open. *ib.*
4. By the term *occupancy*, in the eighth section, is meant all the right or interest which the company could acquire in the land for the purposes contemplated by the act. *ib.*
5. If the company claim a right to enter upon land under color of law, without having complied with the requirements of that law, a court of equity will restrain their entry by injunction. *ib.*

Vide FRAUD (by Incorporated Companies.)

COSTS.

1. Costs disallowed to a successful party, on the grounds that his own unlawful act led to the controversy, and that great and unnecessary expense was occasioned by the examination of numerous witnesses. *Shields v. Arndt*, 234

2. It seems that a creditor is not allowed the costs of proving his claim before the master. But a creditor complaining of the proceedings before the master in settlement of the receivers' accounts may be allowed his costs, to be paid out of the fund, or by the receivers, at the discretion of the court. *Richards v. Morris Canal and Banking Co.* 428
3. An attachment for contempt, being in the nature of a criminal proceeding, costs are not usually allowed. *Magennis v. Parkhurst*, 433

Vide PREROGATIVE COURT, 3.

COURT OF EQUITY.

A court of equity is as much bound by positive rules and general maxims concerning property as a court of law. *Mullany v. Mullany*, 16

COVENANT. Vide AGREEMENT, 10. DEED, 1—3.

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DEED.

1. If the purchaser of a mill-seat and water-power accepts from the vendor a deed, without any covenant for his protection, as to the height of the dam, or the extent of the flow to which he is entitled, and the purchaser is subjected to damages by reason of the improper height of the dam, he is without remedy either at law or in equity. *Hopper v. Lutkins*, 149
2. If it was designed by the parties that a deed should contain covenants, and they have by mistake been omitted by the scrivener, the mistake will be corrected by a court of equity, and the deed reformed accordingly. *ib.*
3. If the deed contain full covenants of warranty as to the height of the dam, and the covenants are broken, a court of equity will not enjoin the vendor from proceeding at law to recover the purchase money, nor set off the damages sustained by the vendee by the breach of such covenants against the claim of the vendor for the purchase money, but will leave the parties to their remedies at law. *ib.*
4. Where the vendor agrees to convey a farm "said to contain one hundred and thirty-five acres, be the same more or less," and the deed executed in pursuance of the agreement describes the land by courses and distances, and adds, "containing one hundred and thirty-five acres, be the same more or less," if there proves to be a deficiency of

- over twenty acres in the quantity of land actually conveyed, the purchaser, upon a bill filed by the vendor for the foreclosure of a mortgage given to secure a part of the purchase money, will be entitled to have an abatement or compensation for the deficiency in the quantity of land. *Couse v. Boyles*, 212
5. It seems that a party has no right to a discovery, nor to the production of title deeds relating alone to his adversary's title. *Thompson v. Engle*, 271
6. In the year seventeen hundred and twenty-five, a tract of land was devised for the benefit of a free school in "the township of Greenwich." In the year seventeen hundred and forty-nine, the same land was conveyed, by persons acting on behalf of the "town of Greenwich," by indenture, to D. S., reserving a yearly rent of thirteen pounds, to be paid unto the trustees for the time being, as they shall be chosen by the inhabitants of "the town of Greenwich" included within certain boundaries in the said deed particularly specified. The rent was paid for about eighty years to the trustees chosen by "the town of Greenwich." *Held*, that D. S. and those claiming under him, were bound to pay the rent reserved to the trustees chosen by the town of Greenwich, pursuant to the reservation in the said deed, and not to the inhabitants of the "township of Greenwich." *Sheppard v. Hunt*, 277
7. The grantee in a deed, and those claiming under him, cannot deny the binding authority of a reservation in the deed. *ib.*
8. Long acquiescence in a given construction of an instrument, renders it unwise and impolitic to change such construction. *ib.*
9. Public policy forbids the disturbance of rights ancient and well settled by the practice of the parties in interest. *ib.*

Vide HUSBAND AND WIFE, 4, 7—9.

DEVISE. Vide TRUST AND TRUSTEE, 1. WILL.

DEVISEES. Vide HEIRS AND DEVISEES.

DISCOVERY. Vide DEED, 5. RECEIVERS, 13.

DIVORCE.

1. A *feme covert* may apply for a divorce for any cause, in her own name, without a *prochein ami*. *Amos v. Amos*, 171
2. Upon a bill for a divorce, the court will, at its discretion, make an allowance to the wife for her maintenance *pendente lite*, and also for counsel fees, whether she be complainant or defendant in the suit. *ib.*
3. The allowance to the wife *pendente lite* will be moderate. No inducement should be held out for the oppression of the husband. *ib.*

4. The court may make the allowance either with or without a reference to a master. *ib.*
5. The allowance may be changed at the discretion of the chancellor, on the application of either party. *ib.*
6. Where children are grown up, no allowance should be made on their account. *ib.*

DOWER. *Vide* HEIRS AND DEVISEES, 3. LEGACY, 4.

H.

ELECTION,

A testator by his will directed that when his youngest child attained the age of twenty-one years, all his real estate should be sold or divided, whichever a majority of his children then living should think best, and invested his executors, and the survivor of them, with full power and authority to sell, either at public or private sale, as to them might seem most advantageous, all his real estate, in case it should be determined by the election of his children, as aforesaid, to make sale. *Held*, that the devisees, before electing whether to sell or divide the land, had a right to call upon the executor to decide, whether in case of a sale he would sell at public or private sale; and if the executor did determine in what manner he would sell, and the devisees were influenced by that determination in making their election to have the property sold, the executor could not alter his determination without giving the heirs an opportunity of altering their decision upon the question of sale or division. *Wright's Ex'r v. Wright*, 28

EQUITABLE INTEREST. *Vide* JUDGMENT AT LAW, 1—3.

EQUITY OF REDEMPTION. *Vide* MORTGAGE, 11.

ESTATE.

1. If a testator devise to a *feme covert* an estate of inheritance in fee simple, he cannot by any restriction or provision in the will deprive the husband of the devisee of his estate by the curtesy in the land devised. *Mullany v. Mullany*, 16
2. Those incidents which by law are inseparably annexed to an estate, cannot be prohibited by any condition or limitation expressed in the deed or will. *ib.*
3. A man cannot by will create such an estate, as by the rules of the common law he could not in his life time create by deed. *ib.*

EVIDENCE.

1. One witness, with corroborating circumstances, is sufficient to overcome the defendant's answer. *Chance v. Teeple*, 173

2. The mere opinions of witnesses in regard to the insolvency of a company, without referring to the facts upon which their opinions are founded, are entirely insufficient, and can never form the basis for the action of the court. *Brundred v. Paterson Machine Co.* 294
3. The affidavits of the complainants, made after filing the bill, are not competent to be read upon a motion for an injunction and the appointment of receivers. *ib.*
4. It is not competent to show by parol, that at the time of executing a bond, the obligee agreed that the obligor should not be personally liable, but that the obligee would look to the mortgage security for payment. *Chetwood v. Brittan,* 334
5. The party calling the subscribing witness to an instrument, is not concluded by his evidence, and if the witness denies the execution of the instrument, other witnesses may be called to establish it. *Ketchum v. Johnson's Ex'rs,* 370
6. A certified copy of the surrogate's proceedings on an application for probate, has the effect of a record, against which no averment will be admitted by the ordinary. *Ex parte Coursen,* 408
7. If it appear by the certified copy of the surrogate's proceedings that probate was granted by him on the application of both the executors, one of the executors will not be permitted to prove, by way of destroying the effect of that record as evidence against him before the ordinary, that his name was used in the application to the surrogate without his consent. *ib.*
8. Direct evidence is not required to sustain the charge of adultery. *Day v. Day,* 444
9. The circumstances to sustain the charge must be such as to lead the guarded discretion of a reasonable and just man to the conclusion that the crime has been committed. *ib.*
10. The rules of evidence are generally the same in equity as at law. *Runyon v. Farmers and Mechanics' Bank of New-Brunswick,* 480
11. Though there be no express evidence of the delivery of an ante-nuptial agreement, and though it be found in the husband's possession after his death, its delivery will be presumed, if its due execution be proved, and it appear that it was recognized by the husband. *Smith v. Moore's Ex'r,* 485
12. The declarations of the husband, made during coverture, and shortly before the execution of a deed of settlement, are not evidence of the ante-nuptial agreement, in pursuance of which the settlement is made. *Satterthwaite v. Emley,* 489
13. Nor will a recital of such agreement in the deed of settlement, be evidence of the agreement, except as against the husband and persons claiming under the settlement. *ib.*

EXCEPTIONS. Vide PRACTICE, III.

EXECUTION AT LAW. Vide JUDGMENT.

EXECUTORS AND ADMINISTRATORS.

If an executor receive the effects of his testator, without applying them in due course of administration, his estate becomes liable for the money so received, and his executor may be called upon in equity to pay the legacies in due course of the administration of the assets which came to his hands. *Smith v. Moore's Ex'r*, 485

Vide **HEIRS AND DEVISEES**, 1, 2. **PROBATE**.

F.

FEME COVERT. Vide **HUSBAND AND WIFE**.

FRAUD (by Incorporated Companies.)

1. The act, entitled, "An act to prevent frauds by incorporated companies," passed February sixteenth, eighteen hundred and twenty-nine, applies not only to banks, but to all incorporated companies other than those specially excepted in the twenty-first section of the act. *Parsons v. Monros Manufacturing Co.* 187
2. There are certain provisions of the act intended to apply to banking companies alone, and when so intended they are referred to as "banks." But the act itself, by its general provisions, goes further, and reaches other corporations, and may be carried out as to them, without the aid of those special sections which are applicable to money corporations alone. *id.*
3. An injunction may be issued under the act, against a bank or other corporation, before the company have actually suspended business. *id.*
4. Where the bill of complaint charges, that the complainant is a stockholder and creditor of the company to a large amount, and specifies in what his claim, as a creditor, consists; that he has repeatedly called on the president of the company for payment, but that he has always failed to make payment; that the president has the entire control of the company; that he is insolvent and uses the property of the company for his own use; that the company is, to the belief of the complainant, insolvent and unable to pay its debts, and unless this court interferes the whole property will be squandered; specifies various unauthorized acts committed by the president, subjecting the property of the company to the incumbrance of mortgages and judgments, without the authority of the board of directors; charges that the company owe a large amount of debts to other persons; that executions are in the sheriff's hands, by virtue of which the property of the company is advertised for sale, and that the company is insolvent according to the complainant's belief, owing to the mismanagement of the president: The facts and circumstances set forth are sufficient to justify the action of the court, and the bill is therefore particular enough in the allegations made. *id.*

5. The whole proceeding under the act must rest upon the insolvency of the company. Unless that is satisfactorily made out, the court has no jurisdiction. *ib.*
6. If the insolvency of the company is established, there still resides in the chancellor a discretion as to the ordering of an injunction and the appointment of receivers, to be governed by the facts and circumstances of the case. *ib.*
7. The court may restrain a company from carrying on its ordinary business, or a bank from issuing notes, and yet leave the directors to settle up its affairs. *ib.*
8. In judging of the solvency or insolvency of a company, its property should be estimated at its fair value, and not at the depreciated price which it might command at a forced sale. *ib.*
9. The most unfavorable inference as to the condition of a corporation, may justly be drawn from the circumstance of the company's withholding its books upon an investigation touching its solvency. *ib.*
10. If the insolvency of the company is satisfactorily established, and the circumstances of the case, in the opinion of the chancellor, call for his interference, an injunction will issue, though many of the creditors and stockholders petition against it. *ib.*
11. Upon a motion for an injunction, and the appointment of receivers, under the act, entitled, "An act to prevent frauds by incorporated companies," the primary question is, whether the corporation be insolvent or not. *Brundred v. Paterson Machine Co.* 294
12. If it be a balancing question, and the course of those who manage the affairs of the company appears to be upright and just, the doubt should be resolved in favor of the rights of the company. *ib.*
13. It would be unwise and impolitic to interfere with any corporation, so long as they are acting with an honest purpose, unless their condition is hopeless, or their course of action such as to jeopard the interests of creditors and the public. *ib.*

Vide RECEIVERS.

G.

GUARDIAN AND WARD.

1. The guardian of an infant cannot convey the real estate of his ward, without the authority of a court of equity; nor will the court sustain such conveyance, made either by the infant or his guardian, though the infant have received the consideration of the conveyance. *Antonidas v. Walling,* 42
2. But in the absence of fraud, the infant will be decreed, upon recovering the land, to refund the consideration money, together with the value of the improvements on the land, arising from repairs of the buildings and fences and manuring the land, though he will not

to decreed to allow the value of new buildings or other permanent improvements. *ib.*

II.

HEIRS AND DEVISEES.

1. A testator by his will directed, that when his youngest child attained the age of twenty-one years, all his real estate should be sold or divided, whichever a majority of his children then living should think best, and invested his executors, and the survivor of them, with full power and authority to sell either at public or private sale, as to them might seem most advantageous, all his real estate, in case it should be determined by the election of his children, as aforesaid, to make sale. *Held*, that the devisees, before electing whether to sell or divide the land, had a right to call upon the executor to decide, whether in case of a sale he would sell at public or private sale; and if the executor did determine in what manner he would sell, and the devisees were influenced by that determination in making their election to have the property sold, the executor could not alter his determination without giving the heirs an opportunity of altering their decision upon the question of sale or division. *Wright's Ex'r v. Wright*, 28.
2. Where a testator, by his will, directs that the residuum of his estate, real and personal, shall be sold by his executors, and the moneys arising from the sale be divided among his children in a different ratio from that in which the land would have descended, the devisees take a vested interest in the proceeds of the sale of the estate, both real and personal, and the executors are bound to make sale according to the directions of the will. *Berrien v. Berrien*, 37.
3. If no sale be made by the executors, a son of the testator does not become seized of such an estate in the land as will entitle his widow to dower. *ib.*
4. The devisees under a will, by accepting the devise, assume the payment of the legacies charged on the real estate, in the proportion of their respective estates in the land devised; and a purchaser under one of the devisees must bear his proportion of the charge. *Stevenson v. Brown*, 503.
5. There is no rule distinguishing between the widow and other devisees. *ib.*

HUSBAND AND WIFE.

1. Though there be no express evidence of the delivery of an antenuptial agreement, and though it be found in the husband's possession after his death, its delivery will be presumed, if its due execution be proved, and it appear that it was recognized by the husband. *Smith v. Moore's Ex'r*, 485.

2. Equity will enforce a post nuptial settlement made in pursuance of a parol ante-nuptial agreement. *Satterthwaite v. Emley*, 489
3. Such settlement cannot be considered voluntary. *ib.*
4. A deed of settlement made by a husband in favor of his wife, after marriage, in pursuance of an alleged parol ante-nuptial agreement, there being no proof of such agreement but the declarations of the husband and the recital in the deed, held void as against the creditors of the husband, whose debts were in existence at the date of the deed. *ib.*
5. Upon a bill by husband and wife for the recovery of a legacy bequeathed to the wife, she is entitled to a reasonable provision out of the legacy before decree in favor of the husband. *Stevenson v. Brown*, 503
6. A *feme covert* is regarded in equity as a *feme sole*, in respect to her separate estate, so far as to enable her to dispose of it in any way not inconsistent with the terms of the instrument under which she holds. *Leaycraft v. Hedden*, 512
7. If by the deed of settlement the husband has relinquished any right which he might have acquired in her estate by the marriage, and covenanted not to intermeddle therewith, but to permit the wife to dispose of it by deed, will or otherwise at her pleasure; her right of disposition remains as it was before the marriage, and she is, in respect of the estate, *feme sole*. *ib.*
8. But if the terms of the deed require a particular mode of disposition, those terms must be observed. Her power is limited by them, and she is *feme sole sub modo*, and only to the extent of the power expressed. *ib.*
9. Where by the deed of settlement it is stipulated that the wife shall be permitted to make what disposition of the trust property she may choose, and that she may have the entire and absolute control over it, and dispose of the same by deed, will or otherwise, at her pleasure, and the trustee covenants to convey the said estates and property as she shall direct; *Held*, that the term convey must have been used as well in reference to the personal as to the real estate, and a direction by the *feme* to her trustee to execute a bond, may in equity be regarded as an appropriation of so much of the estate as may be necessary to pay it. *ib.*
10. If a bond be executed pursuant to the direction of the *feme covert*, by her trustee, in his own name, her separate estate may be charged with the money due on the bond. *ib.*
11. And if the trust be surrendered, and her separate estate held with her general property, so that no means of distinguishing it is afforded to the court, a general decree will be made against her for the payment of the money due on the bond. *ib.*

Vide TRUST AND TRUSTEE, J.

I.

INFANT. Vido GUARDIAN AND WARD.

INJUNCTION.

*I. Of the Injunction generally. In what cases and when granted.**II. To stay Waste, Trespass or Nuisance.**III. To stay Proceedings at Law.**IV. Dissolving Injunction.**I. Of the Injunction generally. In what cases and when granted,*

1. If a company claim a right to enter upon land under color of law, without having complied with the requirements of that law, a court of equity will restrain their entry by injunction. *Browning v. Camden and Woodbury Railroad Co.* 47
2. The court will not, by injunction, restrain a defendant from the use and enjoyment of a work constructed with the express or implied assent of the complainant, though it prove prejudicial to his rights. *Hulme v. Shreve,* 116
3. Nor will the court, under such circumstances, enjoin either the completion of the original work, or the construction of any new work necessarily connected with or forming a part of the original construction. *ib.*
4. But when the defendants, with the complainants' assent, construct new waste gates in their mill pond, connected with a new channel or race-way to carry the water into the complainants' mill pond, at a point nearer to the complainants' mill than its natural and accustomed channel, and after a lapse of four years attempt to extend the race-way from the waste gates, and to cause the water to enter the mill pond still nearer to the complainants' mill, the court will restrain the execution of such new work by injunction. *ib.*
5. And though such new improvement be commenced in the summer and carried on during the ensuing fall and winter, but not completed in February, when the complainants' bill was filed for an injunction, the complainants have not lost their remedy by laches. *ib.*
6. If waste gates be constructed by the defendants, and used by them through a course of years, with the complainants' assent, the complainants cannot have relief by injunction so long as the use of the gates is confined to their original purpose; but if an attempt is made to apply them to a different purpose, injurious to the complainants, the court will by injunction entirely prohibit the use of the gates. *ib.*
7. A court of equity will, by injunction, restrain a mortgagee from proceeding at law to sell the equity of redemption, in satisfaction of the mortgage debt. *Severns v. Woolstan's Ex'rs,* 220

8. Where the object of the bill will be answered, a sheriff's sale should not be restrained by injunction, but the sale should be suffered to proceed, and the money stayed in the sheriff's hands. *Receivers of the Morris Canal and Banking Co. v. Biddle*, 222
9. The diversion of a stream of water, or any part of it, by a complainant, after the allowance of a writ of injunction in his favor, and before the service of the writ, is an abuse of the process of the court. *Shields v. Arndt*, 234
10. The command of an injunction must be implicitly obeyed, but it is the spirit and not the letter of the command to which obedience is required. *Magennis v. Parkhurst*, 433

Vide FRAUD, 3, 6, 10, 11.

II. To stay Waste, Trespass or Nuisance.

11. Injunctions have repeatedly been granted in cases of mere trespass, and that too when committed under pretence of title. *Shreve v. Black*, 177
12. Cutting off the timber from a tract of woodland, valuable chiefly for the wood upon it, is an irreparable injury. *ib.*
13. Injunction to restrain irreparable mischief, by the cutting of timber, denied, where the answer alleged the title and possession of the premises to be in the defendants, and denied the title and possession of the complainants. *ib.*
14. The jurisdiction of a court of equity in cases of waste and nuisance, is of a preventive character, and comes in aid of the courts of law. It is founded on the necessity created by irreparable mischief, and the inadequacy of pecuniary compensation. *Shields v. Arndt*, 234
15. The diversion of a water-course from its accustomed channel, is a nuisance, which, before the nuisance is created, may and should be restrained by injunction. No mere pecuniary compensation will answer the ends of justice. *ib.*
16. The mere denial of the complainant's right by the defendant, in his answer, will not oust this court of its jurisdiction to interfere by injunction. *ib.*
17. In cases of doubt, the right should usually be established at law, before the granting of an injunction. *ib.*
18. A long enjoyment of a right will entitle the party to an injunction to restrain a private nuisance, even though the defendant may deny the right; and the court will exercise its discretion whether to order a trial at law or not, before granting an injunction—always inclining, if there be reasonable doubt, to put the case to a jury. *ib.*
19. A court of equity will not interfere by injunction, in a case of naked trespass, where there is a full remedy at law. *Kerlin v. West*, 449

20. But for the purpose of quieting a possession, or preventing a multiplicity of actions, or where the value of the inheritance is in jeopardy, or irreparable mischief is threatened, in relation either to mines, quarries or woodland, the court will interfere by injunction, even against a person acting under a claim of right. *ib.*
21. The injury may be irreparable either from the nature of the injury itself, or from the want of responsibility in the person committing it. *ib.*

III. To stay Proceedings at Law.

22. The court will not by injunction protect a party who has been erroneously put into possession of land under a writ of restitution; especially where his title has not been established at law. *Thompson v. Engle*, 271
23. Where a right has been repeatedly established at law, or where the same right is subject to be controverted by different persons, a court of equity may put an end to litigation by restraining suits at law and settling the whole controversy, or if need be, by directing a single trial at law. *ib.*
24. But the court will not interfere to quiet the possession of a party, where there has been no trial of the right at law, and where there is but one adverse claimant. *ib.*

Vide JUDGMENT, 4.

IV. Dissolving Injunction.

25. Where an injunction is granted *ex parte*, the court will at any time hear a motion to dissolve for want of equity, unless for special cause. *Receivers of the Morris Canal and Banking Co. v. Biddle*, 222
26. The general rule is, that an injunction properly granted, will not be dissolved till all the defendants have answered. *Stoutenburgh, Day and Co. v. Peck, Pierson and Co.* 446
27. It is the duty of the complainant to take the requisite steps to compel an answer from all the defendants, and if he neglect to do so, the injunction may be dissolved though a part only of the defendants have answered. *ib.*
28. If the defendant, upon whom rests the *gravamen* of the charge, answers, denying the whole equity of the bill as against him, the injunction will be dissolved. *ib.*
29. To entitle a defendant to the dissolution of an injunction, he must deny the whole equity of the bill upon which the injunction is based. He must answer directly and without evasion, and must not merely answer the several charges literally, but he must traverse the substance of each charge. *Everly v. Rice*, 553
30. The defendant must answer upon his own knowledge, and not upon

information and belief; otherwise the injunction must be retained till the final hearing. *ib.*

Vide PRACTICE, II.

INTEREST. Vide MORTGAGE, I.

J.

JUDGMENT AT LAW.

1. A judgment at common law is not a lien upon a mere equitable interest, nor is such interest the subject of a levy and sale by virtue of an execution. *Vancleve v. Groves*, 330
2. A mere equity cannot be sold by virtue of an execution at law. *Ketchum v. Johnson's Ex'rs*, 370
3. It seems that the equity of redemption of the mortgagor cannot be sold upon an execution at law after the mortgagee has been let into possession. *ib.*
4. If facts exist which render it inequitable in the plaintiff at law to enforce his judgment, and those facts could not avail the defendant, either by reason of the rigid rules of law, or by fraud or accident, or by reason of their not being known to him in time for that purpose, without any fraud or negligence on his part, equity will restrain the plaintiff by perpetual injunction from proceeding upon his judgment, or will otherwise relieve against it. *Powers' Ex'rs v. Butler's Adm'r*, 465

Vide JURISDICTION, 8—10.

JURISDICTION (OF CHANCERY.)

1. If it was designed by the parties that a deed should contain covenants, and they have by mistake been omitted by the scrivener, the mistake will be corrected by a court of equity, and the deed reformed accordingly. *Hopper v. Lutkins*, 149
2. If the deed contain full covenants of warranty as to the height of the dam, and the covenants are broken, a court of equity will not injoin the vendor from proceeding at law to recover the purchase money, nor set off the damages sustained by the vendee by the breach of such covenants, against the claim of the vendor for the purchase money, but will leave the parties to their remedies at law. *ib.*
3. There is no mode in which the damages sustained by the breach of such covenants can be satisfactorily ascertained in a court of equity. *ib.*
4. A court of equity can interfere to set off the damages sustained by the vendee by breach of the covenants in his deed, against the claim of the vendor for the purchase money, only where the covenants are such that the damages resulting from the breach can be ascertained according to the practice of the court. *ib.*

5. The jurisdiction of a court of equity in case of waste and nuisance, is of a preventive character, and comes in aid of the courts of law. It is founded on the necessity created by irreparable mischief, and the inadequacy of pecuniary compensation. *Shields v. Arndt*, 234
6. The court of chancery will lend its aid to carry out the intent of the testator, and may change the mode of enjoyment of a fund to save it from loss or great depreciation. *Manning v. Craig*, 436
7. A court of equity will sustain an original bill filed to correct a former decree of the same court. *Whittemore v. Coster*, 438
8. Courts of equity originally interfered to grant relief against judgments at law, on account of the impossibility of obtaining relief at law by new trial, when, under the circumstances, the verdict ought not to conclude the party. *Powers' Ex'rs v. Butler's Adm'r*, 465
9. As the courts of law have extended their jurisdiction over the subject, courts of equity have withdrawn theirs from it. *ib.*
10. It is now the settled doctrine of the English court of chancery, not to relieve against a judgment at law on the ground of its being contrary to equity, unless the party aggrieved was ignorant of the fact relied on as the ground of relief pending the suit, or it could not have been received as a defence. *ib.*
11. If facts exist which render it inequitable in the plaintiff at law to enforce his judgment, and those facts could not avail the defendant, either by reason of the rigid rules of law, or by fraud or accident, or by reason of their not being known to him in time for that purpose, without any fraud or negligence on his part, equity will restrain the plaintiff by perpetual injunction from proceeding upon his judgment, or will otherwise relieve against it. *ib.*

Vide FRAUD, 5.

L.

LEASE. Vide MISTAKE, 1, 2.

LEGACY.

1. A testator bequeathed as follows:—"Two hundred and fifty-one shares of stock that I hold in the great western turnpike company, in the state of New-York, to remain unsold, and the dividends arising thereon I direct to be equally divided between my sons, J., D. and E., my daughters, M., M., S. and D., and my grand-child, O. S. T." Held, That the turnpike stock is an absolute specific legacy to be enjoyed by the receipt of the dividends. *Manning v. Craig*, 436
2. The gift of the produce of a fund without limit as to time, is a gift of the fund; and the interest of each of the legatees is vested and assignable. *ib.*
3. The court of chancery will lend its aid to carry out the intent of the

testator, and to save the fund from loss or great depreciation, may change the mode of enjoyment. *ib.*

4. Where a testator charges his lands with the payment of legacies, and devises the use of the land to his wife as long as she remains his widow, in lieu of her dower; if the widow accepts the devise, she takes it subject to the incumbrance of the legacies. *Stevenson v. Brown*, 503
5. Upon a bill by husband and wife for the recovery of a legacy bequeathed to the wife, she is entitled to a reasonable provision out of the legacy before decree in favor of the husband. *ib.*

Vide HEIRS AND DEVISEES, 4. LENGTH OF TIME, 1.

LENGTH OF TIME.

1. Where a bill for the recovery of a legacy bequeathed to a married woman, was filed thirty-one years after the death of the testator, twenty-four years after the settlement of his estate, and seventeen years after the death of the executor, and no cause shown for the delay, the bill was dismissed on the ground of the presumption of the payment of the demand, arising from the time which elapsed after the right of action accrued before suit brought. *Peacock v. Newbold's Ex'rs*, 61
2. The cases of *Ellison v. Moffat*, 1 *John. Chan. R.* 46, and *Jones v. Turberville*, 2 *Vesey, jun.* 11, approved. *ib.*
3. Mere lapse of time constitutes in itself no bar to a decree for specific performance. *New-Barbadoes Toll Bridge Co. v. Vreeland*, 157

LEX LOCI CONTRACTUS. Vide AGREEMENT, 3.

M.

MASTER'S REPORT. Vide PRACTICE, III.

MILL-SEAT AND WATER-POWER. Vide DEED, 1—3. INJUNCTION, 4—6.

MISTAKE.

1. M., by indenture, leased to C. at a stipulated rent, a saw-mill with a quantity of water to drive it "equal to six horse power." At the time of executing the lease, it was generally understood, and believed by the lessor, that a less quantity of water would constitute a horse power at the site of the mill, than was actually required, and the rent was graduated upon that erroneous assumption. *Held*, That the lessor must suffer the consequences of his mistake, and that he was neither entitled to charge the lessee a higher rent than that stipulated in the lease, nor to restrain him from drawing a quantity of water equal to six horse power. *McKelway v. Cook*, 102
2. Nor will the lessor be entitled to relief although the lessee himself acted at the execution of the lease under the same erroneous impres-

sion, unless it appear that he expressly agreed that the stipulated power should be guaged upon such erroneous estimate. *ib.*

Vide DEED, 2.

MORTGAGE.

I. Of the Mortgage generally.

II. Assignment and Registry of Mortgage, Equity of Redemption, Foreclosure and Sale of Mortgaged premises.

I. Of the Mortgage generally.

1. If a bond and mortgage, given by a resident of New-Jersey to a person temporarily residing there, but having his permanent residence and his place of business in New-York, be made and executed in New Jersey, but delivered to the obligee at his place of business in the city of New-York, and the money there paid, the place of the contract is in New-York, and interest is to be computed according to the laws of that state, although the obligee be described in the bond as now of the state of New-Jersey. *Varick's Ex'r v. Crane*, 128
2. Nor will the construction be affected by the circumstance that the bond and mortgage were given to secure the purchase money of land in New-Jersey. *ib.*
3. By the act incorporating the Morris Canal and Banking Company, they were authorized to construct a canal to connect the waters of the Delaware with the waters of the Passaic. By a subsequent act, the company were authorized "to continue the Morris canal to the waters of the Hudson, at or near Jersey City." By an act passed January twenty-eighth, eighteen hundred and thirty, the company were authorized to borrow money, and for securing the due payment thereof, to hypothecate by way of trust, mortgage or otherwise, "the Morris canal, with all its privileges, appendages and appertinances, and all the property and chartered rights of the said company." The company having made a loan, executed a mortgage, by authority of the said act, "upon all and singular the Morris canal, so called, being the canal authorized by the laws of the state of New-Jersey, as the said canal has been laid out, through the several counties of Warren, Sussex, Morris, Essex and Bergen, in the said state of New-Jersey, and being now in a course of completion from the Delaware to the Hudson river; together with all and singular the dams, aqueducts, locks, planes, culverts, bridges, towing-paths, embankments, basins, wharves, docks, waters, water-courses, machinery, privileges, appendages and appertinances thereto belonging or appertaining." At the time of the execution of the mortgage, the canal had not been constructed from the Passaic to the Hudson, nor had the land been purchased upon which the canal was subsequently constructed. The route had been surveyed, though a part of the

route was subsequently varied. *Held*, 1. That the said mortgage covered the entire canal from the Delaware to the Hudson, and also the pier at Jersey City, which was constructed upon land purchased after the execution of the mortgage. 2. That the feeder of the canal passed by the said mortgage as part and parcel thereof. *Willink v. Morris Canal and Banking Co.* 377

4. If a subsequent mortgagee, or his agent, had notice of the existence of a mortgage from the Delaware to the Passaic, it was sufficient to put him upon inquiry, and the first mortgagee will be entitled to priority upon the whole canal, although his mortgage was not duly acknowledged or proved and recorded. *ib.*
5. The legislature, by giving authority to the company to execute a mortgage, intended to invest the mortgagee with all the power and authority incident to an instrument of that kind, and although no express authority is given by the statute to sell the premises by virtue of the said mortgage, a power of sale is to be inferred from the authority to mortgage. *ib.*
6. If a bond and mortgage are paid by the tenant of the equity of redemption, they are discharged as to all subsequent incumbrances. *Bolles v. Wade,* 458
7. The mortgage being but the accessory, when the bond is paid the mortgage is discharged, *ib.*

II. *Assignment and Registry of Mortgage, Equity of Redemption, Foreclosure and Sale of Mortgaged premises.*

8. If a purchaser of real estate gives to the vendor a mortgage for part of the purchase money, and then sells the equity of redemption in the mortgaged premises; upon a bill filed to foreclose the equity of redemption against the present owner, a court of equity will not enforce the specific performance of an agreement made by the mortgagee with an intermediate owner, nor permit the defendant to set off the damages sustained by the present owner by reason of the breach of such agreement, against the amount due on the mortgage. *Vanhouten v. McCarty,* 141
9. Priority of registry will not avail against actual previous notice of an unregistered mortgage. *Chance v. Teeple,* 173
10. A court of equity will, by injunction, restrain a mortgagee from proceeding at law to sell the equity of redemption, in satisfaction of the mortgage debt. *Severns v. Woolston's Ex'rs,* 220
11. If the mortgagor sells the land covered by the mortgage in different parcels and at different times, that portion of the land last sold must first be applied in discharge of the mortgage debt, and if that be not sufficient, then the other portions in the inverse order of the sales. *Wikoff v. Davis,* 224
12. And the same principle applies though the sales in parcels were

- made not by the mortgagor, but by a person claiming title under him. *ib.*
13. The rule will not interfere with a special agreement, and if one of the purchasers agree to pay off the whole incumbrance, the contract will be enforced. *ib.*
14. The purchaser of a mere equity of redemption purchases a right, and does not assume an obligation to redeem. He may at his pleasure give up the mortgaged premises in satisfaction of the incumbrance. *Tichenor v. Dodd*, 454
15. He is liable to the extent of the value of the premises, and not beyond it. *ib.*
16. But if by the terms of the sale the mortgage money is to be taken as a part of the consideration, equity raises upon the conscience of the purchaser an obligation to indemnify the mortgagor against the mortgage debt. *ib.*
17. And if the debt be afterwards paid by the mortgagor, equity will compel the purchaser to refund the money so paid. *ib.*
18. The tenant of the equity of redemption, by purchasing the mortgage debt, thereby extinguishes the incumbrance on his land. *Bolles v. Wade*, 458
19. And if the bond and mortgage so paid by the owner of the equity of redemption, be assigned to a third party at his request, they acquire by such assignment no greater efficacy than they would have had if delivered directly to the owner of the equity of redemption. *ib.*
20. Such assignee could not have enforced the payment of the debt against the owner of the equity of redemption, nor could he have claimed priority against other incumbrances upon the same premises. *ib.*
21. If such assignee assign the bond and mortgage to a third party at the request and for the benefit of the owner of the equity of redemption, as against him the lien of the second assignee is good. The mortgage, as against him, acquired new life on its transfer, but it cannot be restored to its lost priority. *ib.*
22. The assignee of a bond and mortgage can acquire by virtue of the assignment no greater interest than was held by the assignor; all the equities affecting the assignor pass with the assignment to and against the assignee. *ib.*
23. The purchaser of real estate by deed of warranty, has a right to relief in equity against the vendor, who seeks to enforce the payment of a bond and mortgage given for the purchase money, until a suit actually brought to recover the premises by a person claiming them by a paramount title, shall have been determined. *Jaques v. Esler*, 461
24. And the rule applies, whether the purchaser had notice of the outstanding claim or not. *ib.*

25. And the assignee of the bond and mortgage takes them subject to the same equity. *ib.*
26. The ground upon which the equity existing between the obligor and obligee passes to the assignee, is, that the assignee may, before taking the assignment, learn from the obligor whether there be any set off or objection to the bond. *ib.*
27. If the obligor mislead the assignee, or gives assurance of payment notwithstanding the existence of the suit for the premises, he has waived his equitable right to withhold the money until the suits are determined. *ib.*
- Vide JUDGMENT AT LAW, 3. VENDOR AND PURCHASER, 1.

N.

NUISANCE. Vide INJUNCTION, II.

O.

ORDINARY AND SURROGATES.

1. By the commission and explanatory instructions to lord Cornbury, all the ecclesiastical jurisdiction of the province of New Jersey relating to "the collating to benefices, granting licenses for marriages, and probate of wills," was reserved to the governor. He was not only ordinary, but metropolitan of the province. He had no superior but the queen in council, and no subordinates. His jurisdiction over these subjects was sole and exclusive. *Ex parte Coursen*, 408
2. This constitution of the court continued till the revolution, and was adopted by the convention which framed the constitution of the state in seventeen hundred and seventy-six. *ib.*
3. For one hundred and forty years, the governor or ordinary has been the only judge of probate known to the constitution of New Jersey. *ib.*
4. The surrogates appointed by the governor were mere deputies, subject to the control and supervision of the ordinary, and to be removed at his pleasure. *ib.*
5. By the appointment of surrogates, the ordinary did not in the least curtail his own jurisdiction. Whilst he held appellate jurisdiction over their acts, his own original jurisdiction remained entire. *ib.*
6. The surrogates did not hold to the ordinary the relation which the English ordinaries hold to their metropolitan. The ordinary retained jurisdiction of all cases. The surrogate, acting as his deputy, had also jurisdiction of all cases submitted to him, unless some special restriction were inserted in his commission. *ib.*
7. The doctrine of *bona notabilia* had never any place in this state. *ib.*

8. The surrogate and the orphans' court, in matters of probate and administration, were left, by the act of seventeen hundred and eighty-four, which established the orphans' court, to occupy the same relation to the ordinary, which previous to that statute the surrogate alone had occupied. *ib.*
9. The act of eighteen hundred and twenty is similar in this respect to the act of seventeen hundred and eighty-four. *ib.*
10. The fact that the appointment of his surrogates has been taken from the ordinary and conferred upon the joint-meeting, does not in the least alter their relative jurisdictions or powers. *ib.*
11. The surrogates are still, in the language of the act of eighteen hundred and twenty, the ordinary's surrogates, and in effect his deputies. *ib.*
12. The ordinary has the same original and appellate powers now that he ever had. *ib.*
13. The original jurisdiction of the ordinary over the probate of wills and the granting of letters of administration, is general and full, and not limited and special. *ib.*
14. The acts of seventeen hundred and eighty-four and eighteen hundred and twenty, are merely declaratory, so far as they attempt to specify the subjects of the jurisdiction of the ordinary or of his surrogates. *ib.*
15. The ordinary has, by virtue of his general powers, undoubted jurisdiction in the matter of the probate of a will, where the testator, at the time of his death, resided in a foreign state, and where the will has been proved there. *ib.*
16. The jurisdiction of the ordinary in such cases is complete, without the aid of any statute, at least where the original will is produced. *ib.*
17. Whether he may, under such circumstances, grant letters testamentary upon the production of an exemplified copy of the will, is perhaps doubtful. *ib.*
18. Whether, since the acts of seventeen hundred and eighty-four and eighteen hundred and twenty have limited the surrogate's jurisdiction to his own county, he may grant probate of a foreign will independent of the statute, seems doubtful. *ib.*
19. The jurisdiction of the ordinary is not taken away or impaired by the act of eighteen hundred and twenty-eight, which authorizes surrogates to grant letters testamentary upon an exemplified copy of a foreign will proved in another state. The ordinary may proceed independent of the statute, nor is he bound by the terms or the equity of that statute to exact security of foreign executors. *ib.*
20. The jurisdiction of the ordinary is concurrent with that of his surrogates, and whenever a surrogate has obtained cognizance of a particular case, the ordinary cannot interfere *pendente lite*. *ib.*

21. He may review the surrogate's proceeding by appeal, but in no other way. ib.

Vide EVIDENCE, 6, 7.

ORPHANS' COURT.

Vide PREROGATIVE COURT, 1—3. ORDINARY AND SURROGATES, 8.

P.

PARTIES. Vide PLEADING, I.

PLEADING.

I. Parties. II. Bill. III. Answer.

I. Parties.

1. The purchasers of real estate are entitled to be heard before any decree is made impeaching the validity of the sale under which they claim title. *Thompson v. Engle*, 271
2. The undeniable general rule in equity is, that a nominal trustee cannot bring a suit in his own name, but must join with him the names of the persons having the beneficial interest. *Willink v. Morris Canal and Banking Co.* 377
3. But the court will, in its discretion, dispense with a strict adherence to the rule, where by complying with it great inconvenience or unnecessary expense would be incurred. ib.
4. Where a banker negotiated in the city of Amsterdam a loan of seven hundred and fifty thousand dollars, for the Morris Canal and Banking Company, and the company, to secure the repayment of the loan, executed a mortgage to the said banker, "being the agent and trustee of the several subscribers to the loan," reciting that the loan was to be advanced by the subscribers thereto according to the sums subscribed by each of them respectively, and that the principal and interest thereby secured should be paid in Amsterdam to the said banker, "*representing the said lenders*, or to his successor or successors in the said trust, or to such person or persons as he or they might substitute or appoint for that purpose;"—*Held*, that the mortgagee might file a bill to foreclose the mortgage in his own name, without making his *cestui que trusts* parties. ib.
5. The case is excepted out of the general rule, on the ground of the great inconvenience to which a compliance with it would subject the complainant. ib.
6. The true additional parties, if any, would be the owners of the stock at the time of filing the bill. To require them to be made parties would be almost a denial of the aid of the court. ib.
7. Nor is it necessary that the complainant should state upon the face of his bill, in order to warrant the filing of the bill in his own name, that the *cestui que trusts* are so numerous that they cannot, without

- great inconvenience, be brought before the court. The character of the transaction sufficiently appears upon the face of the mortgage, as disclosed in the bill. *ib.*
8. *Held*, also, that it was a part of the original contract between the mortgagors and mortgagee, that the lenders should in this transaction be represented by the mortgagee, and by him alone. The court will not, therefore, oblige him, in seeking to recover the money, in the face of this agreement, to come into court in the names of all the lenders. *ib.*
9. The assignee of a bankrupt or an insolvent is a necessary party to a bill affecting the property of such bankrupt or insolvent, because the property by the assignment passes to and vests in the assignee. *ib.*
10. Are the receivers, appointed under the act, entitled, "An act to prevent frauds by incorporated companies," necessary parties to a bill affecting the property of the company of which they are appointed the receivers?—*Quere.* *ib.*
11. Where the receivers were appointed after a decree *pro confesso* had been taken against the corporation, by which the right of the complainant to recover was established, *Held*, that the receivers were not necessary parties, and that an objection made by a third party to the bill for want of proper parties on that ground, would not be sustained. *ib.*
12. If the receivers should ask to be substituted as defendants, with the view of setting up a defence, the court would permit them to do so at any stage of the proceedings. *ib.*
13. Upon a bill of foreclosure, a subsequent mortgagee upon the same premises, though a mere trustee, is a necessary party. It is not enough that the *cestui que trusts* are before the court. *ib.*
14. But where the property subject to the subsequent mortgage was small, and the *cestui que trusts* were before the court, an objection for want of parties, on the ground that the trustee was not a party, was overruled, inasmuch as the right of the trustee to redeem would not be bound by the decree. *ib.*
15. If one of several joint mortgagees dies, his representatives must be made parties to a bill affecting the rights or interests of the mortgagees. Such bill cannot be filed by or against the survivors only. *Smith v. Trenton Delaware Falls Co.* 505
16. If the effect of granting the prayer of a bill will be to relieve the receivers of an incorporated company from a portion of their duties, and to effect, *pro tanto*, a removal of the receivers, they must be made parties. *ib.*

II. Bill.

17. If the contract is several, it is no ground of objection that the contract made by the complainant with divers defendants, be described in the bill of complaint as a contract between the complainant and defendant, without reference to the other parties. *New-Barbadoes Toll Bridge Co. v. Vreeland*, 157

18. In a bill filed for an injunction to restrain waste or irreparable mischief, it is not necessary to set out the complainant's title at length. *Shreve v. Black*, 177
19. A complainant, by stating the injury to have been committed under allegation of title, does not state himself out of court. *ib.*
20. A court of equity will sustain an original bill filed to correct a former decree of the same court. *Whittemore v. Coster*, 438
21. Where a bill charges that an act of the legislature is contrary to the constitution of the United States, and in violation of the rights of the complainant, and illegal and void, the court will not, under the general prayer for relief, declare such act unconstitutional or void. *Smith v. Trenton Delaware Falls Co.* 505

Vide FRAUD, 4. RECEIVERS, 13—15. PRACTICE, I.

III. Answer.

22. If the defendant by his answer admits the existence of the mortgage sought to be foreclosed, but seeks to avoid it, the matter alleged by way of avoidance must be sustained by evidence independent of the answer. *Bray's Ex'r v. Hartough*, 46
23. One witness, with corroborating circumstances, is sufficient to overcome the defendant's answer. *Chance v. Teeple*, 173
24. To entitle a defendant to a dissolution of an injunction, he must deny the whole equity of the bill upon which the injunction is based. He must answer directly and without evasion, and must not merely answer the several charges literally, but he must traverse the substance of each charge. *Everly v. Rice*, 553
25. Where there are particular charges, they must be answered particularly and precisely, and not in a general manner, though the general answer may amount to a full denial of the charges. *ib.*

POSSESSION.

Possession, to constitute notice of a claim of title sufficient to put a purchaser on inquiry, must be an actual possession, manifested by notorious acts of ownership, such as would naturally be observed by and known to the public. *Holmes v. Stout*, 492

PRACTICE.

I. Process, Bill, Order of Dismissal, &c.

II. Motions, Hearing, Application for Injunction, &c.

III. Master's Report, Receivers' Accounts, Exceptions and Decrees.

IV. Attachment for Contempt.

I. Process, Bill, Order of Dismissal, &c.

1. If the defendant is properly charged in the bill, as executor, or devisee, or in any other special capacity, it is no ground of demurrer

- That the subpoena is issued against him generally, without stating the character in which he is sued. *Walton's Ex'rs v. Herbert*, 73
2. Where a bill has been filed by one of several legatees, for his share of a legacy, against the executors and the other legatees, and an interlocutory decree has been made establishing the right of the legatees to recover—the complainant cannot, after such decree, dismiss his bill to the prejudice of the legatees who are defendants, without their consent; and if such order of dismissal be made, it will be vacated and set aside, except so far as respects the complainant; and the interlocutory decree, and the master's report thereon, will be deemed valid and effectual so far as respects the other legatees. *Coldins v. Taylor's Ex'rs*, 163
3. Order of dismissal, as it respects parties prejudiced thereby, vacated after the lapse of three years from the date of the order. *ib.*

II. Motions, Hearing, Application for Injunction, &c.

4. Where the facts are all before the court, application to vacate a decree or set aside an order may be made upon motion merely. It is not necessary to file a petition. *OsKins v. Taylor's Ex'rs*, 163
5. Upon the argument of a motion for an injunction, the answer of one defendant will be received, and heard upon the argument as an affidavit, in answer to the complainant's bill. *Shreve v. Black*, 177
6. A motion to dissolve an injunction for want of equity in the bill, will be heard before answer filed. *Receivers of the Morris Canal and Banking Co. v. Biddle*, 222
7. Where an injunction is granted *ex parte*, the court will at any time hear a motion to dissolve for want of equity, unless for special cause. *ib.*
8. The affidavits of the complainants, made after filing the bill, are not competent to be read upon a motion for an injunction and the appointment of receivers. *Brundred v. Paterson Machine Co.* 294
9. It is no objection to the dissolution of an injunction, that exceptions have been filed to the defendant's answer. The rule of the English court of chancery upon this subject does not prevail in New Jersey. *Wyckoff v. Cochran*, 420
10. The court will hear the argument upon the exceptions to the answer, and upon the motion to dissolve the injunction, at the same time. *ib.*

III. Master's Report, Receivers' Accounts, Exceptions and Decree.

11. Where the master has reported the amount due upon several mortgages, and also their order of priority, and upon exceptions taken to the report the order of priority is changed, a final decree may be taken at once, without a reference back to the master. *Chance v. Temple*, 173
12. A final decree after enrollment, and execution issued thereon, and

after the lapse of nearly three years from the date of the decree, will be set aside for the purpose of correcting a plain and gross mistake in the master's report, although the defendant appeared and demurred to the bill of complaint, and afterwards suffered a decree *pro confesso* to be taken against him, and an *ex parte* report to be made by the master. *Miller v. Rushforth*, 174

13. If a case be once properly before the court, the court will do all in its power to settle the rights of all the parties in the matter in controversy, justly and equitably by one decree. *Couse v. Boyles*, 212

14. The report of a master upon the accounts of receivers requires confirmation, and may be excepted to. The several items of the account may be investigated. *Richards v. Morris Canal and Banking Co.* 428

15. It seems that a creditor is not allowed the costs of proving his claim before the master. But a creditor complaining of the proceedings before the master in the settlement of receivers' accounts may be allowed his costs, to be paid out of the fund, or by the receivers, at the discretion of the court. *ib.*

16. Notice should be given of an application on behalf of the creditors, for leave to file exceptions to the master's report. An order for leave to file exceptions, made without notice, discharged. *ib.*

IV. Attachment for Contempt.

17. A party under an attachment for contempt for an alleged breach of an injunction, is not confined to his answers to the interrogatories exhibited to him, but may examine witnesses to exculpate himself from the charge. *Magennis v. Parkhurst*, 433

18. Should the depositions on the part of the defendant be taken by leave of the court?—*Quere.* *ib.*

19. The party alleging a contempt of court by breach of an injunction, must make it out clearly to the satisfaction of the court. *ib.*

20. If the accused deny the contempt, or do not clearly show it by his answers, the prosecutor may examine witnesses to prove it. *ib.*

21. An attachment for contempt, being in the nature of a criminal proceeding, costs are not usually allowed. *ib.*

PREROGATIVE COURT.

1. The limitation of time within which an appeal is to be taken from the determination of the orphans' court, to the prerogative court, under the twenty-first section of the act, entitled, "An act to ascertain the power and authority of the ordinary and his surrogates," &c. (*Rev. Laws, 776*.) refers not to the filing of the petition of appeal in the prerogative court, but to the demanding and filing the appeal in the orphans' court. *Clark v. Haines*, 136

2. The party appellant, upon making his appeal in the court below, should procure all the necessary transcripts from that court, and file



- them, together with his petition of appeal, in the prerogative court, at the term next after the demand of the appeal in the court below. *ib.*
3. The appellant in the prerogative court is not required to deposit one hundred dollars to answer the costs of the appeal, according to the practice of the court of appeals. *ib.*
4. The prerogative court will, in a summary manner, upon mere motion, inquire into the validity of an order previously made by the ordinary for the prosecution of an administrator's bond. *Ex parte Webster,* 558
5. The validity of the order cannot be inquired into by the court in which the action is brought upon the bond. *ib.*
6. The usual and proper practice on applications to the prerogative court, is to proceed by petition, duly verified, setting forth the facts upon which the application is founded; but the court will not, for the mere want of a petition, set aside an order otherwise regular. *ib.*
7. It must appear that an order for the prosecution of an administrator's bond was made at the request of a party aggrieved. *ib.*

PROBATE.

1. If one executor of a foreign will proved in another state, has applied for probate under the statute, another executor may produce and prove the original will independent of the statute. *Ex parte Couraen,* 408
2. Nor is it necessary that the executor who produces the original will should prove it before the same surrogate who granted letters testamentary to his co-executor. *ib.*
3. He may prove it before the ordinary, or perhaps before another surrogate. The applications are distinct and independent. *ib.*
4. When, however, the executors have all taken out letters, they are co-executors of the will, and must sue and be sued jointly, in the same manner as if they had all proved the will at the same time and before the same officer. *ib.*
5. A certified copy of the surrogate's proceedings on an application for probate has the effect of a record, against which no averment will be admitted by the ordinary. *ib.*

Vide ORDINARY AND SURROGATES.

PURCHASER. Vide VENDOR AND PURCHASER.

R.

RECEIVERS.

1. Are the receivers, appointed under the act, entitled, "An act to prevent frauds by incorporated companies," necessary parties to a bill

- affecting the property of the company of which they are appointed the receivers?—*Quere. Willink v. Morris Canal and Banking Co.* 377
2. The property of the company does not vest in the receivers, nor does the appointment of receivers necessarily put an end to the corporation. *ib.*
 3. The title to the property is not changed by the appointment of the receivers. A power only is delegated to the receivers to take charge of it and sell it. *ib.*
 4. It seems that the receivers may sue or defend in the name of the corporation. *ib.*
 5. In the disposition of the trust property in their hands, receivers have a discretion, for the due exercise of which they are responsible to the court, and in the exercise of which they are subject to its control. *Knott v. Receivers of the Morris Canal and Banking Co.* 423
 6. Receivers are not, like executive officers, bound to sell for the highest price, without regard to the purchaser, or to the disposition he may make of the property. *ib.*
 7. Where the receivers of the Morris Canal and Banking Company advertised that proposals would be received by them until a specified day for leasing the canal for one year, *Held*, that the advertisement did not bind the receivers to take the offer of the highest bidder, nor limit them to a certain time within which to receive bids. *ib.*
 8. The receivers appointed under the act, entitled, "An act to prevent frauds by incorporated companies," derive their power wholly from the statute. They have no authority which is not conferred by the act. *Runyon v. Farmers and Mechanics' Bank of New-Brunswick,* 480
 9. It is not necessary that the power should be expressly conferred. It is sufficient if it can be fairly implied from the general scope of the statute, or as incident to a power expressly given. *ib.*
 10. The receivers have power to administer oaths to witnesses in matters pending before them, which they are empowered by the statute to hear and determine. *ib.*
 11. The receivers, in the admission or rejection of testimony, are to be governed by the rules of evidence. *ib.*
 12. Under the act, entitled, "An act to prevent frauds by incorporated companies," the receivers have authority to compel a disclosure of the knowledge possessed by any person of the affairs and transactions of the company, and a creditor may have such disclosures, upon a proper application for that purpose to the receivers. He cannot maintain a bill for such discovery. *Smith v. Trenton Delaware Falls Co.* 505
 13. Nor can a bill be maintained by a creditor of an incorporated company, after the appointment of receivers, to settle the validity and priority of claims and incumbrances upon the property of the company. It is the duty of the receivers to settle priorities, and in so

doing to decide upon the validity of the claims against the company. *ib.*

14. Nor can a bill be sustained by such creditor to inquire into the validity of assignments or transfers of property made by the company. This also is within the province of the receivers. *ib.*

Vide PLEADING, 12. PRACTICE, III.

RELIGIOUS SOCIETY.

1. The general synod of the Associate Reformed church have, by the constitution of the said church, no authority to do any act, or make any regulation, which interferes with the established order of the church. *Associate Reformed Church v. Trustees of Theological Seminary*, 77
2. The act of union between the general synod of the Associate Reformed church and the general assembly of the Presbyterian church, adopted on the twenty-first day of May, eighteen hundred and twenty-two, is invalid. *ib.*
3. A transfer of the funds of the church, as a consequence of the said union, and necessarily connected therewith, is also invalid. *ib.*
4. That portion of the Associate Reformed church which refused to acquiesce in the act of union, but maintained its separate and independent existence, retained all the rights and interest in the funds which the church possessed prior to the act of union. *ib.*
5. It is a well established principle, that when part of any religious association separate and establish a new society, they cease to be members of the original society, and have no longer any claim to their property. *ib.*
6. Where property has been given in trust for a church not incorporated, it is competent for any person belonging to that church, on behalf of himself and of all others belonging to that church and entitled to the use of the funds, to come into a court of equity to enforce the execution of the trust. *ib.*
7. And if the church consists of various congregations, any one or more of such congregations, being incorporated, may in like manner enforce the execution of the trust. *ib.*

RENT. Vide DEED, 6. MISTAKE, 1.

S.

SEPARATE ESTATE. Vide HUSBAND AND WIFE, 6—11.

SET OFF. Vide JURISDICTION, 2, 4.

SHERIFF AND SHERIFF'S SALE.

1. Where the object of the bill will be answered, a sheriff's sale should not be restrained by injunction, but the sale should be suffered to pro-

- ceed, and the money stayed in the sheriff's hands. *Receivers of the Morris Canal and Banking Co. v. Biddle*, 222
2. The sheriff remains liable for property in his hands by virtue of an execution, notwithstanding he is restrained by injunction from proceeding to a sale. *ib.*
 3. A sheriff's sale, regularly made by virtue of an execution out of this court, set aside, on the ground that a party having an incumbrance subsequent to the complainant, was by a mistake of her agent prevented from attending the sale, and that the premises sold for an inadequate price, to the prejudice of the party seeking to avoid the sale. *Howell v. Hester*, 266
 4. Premises purchased at sheriff's sale and conveyed to the purchaser under a parol agreement to permit the defendant in execution to redeem, ordered to be reconveyed. *Combs v. Little*, 310
 5. The purchaser, in addition to the price of redemption, allowed a fair compensation for his time, trouble and expenses. *ib.*

SPECIFIC PERFORMANCE. Vide AGREEMENT.

SURROGATE. Vide ORDINARY AND SURROGATES.

T.

TRESPASS. Vide INJUNCTION, II.

TRUST AND TRUSTEE.

1. Upon a devise of real estate to executors in trust to permit a married daughter "to use and occupy the farm and to take the rents, issues and profits thereof to her own use during her natural life, free from any control of her present or any future husband, and not to be in any wise liable for any debt or debts he now owes, or which any future husband may hereafter contract," the court will not, upon the death of the husband, permit the trust to be set aside, or the estate to be conveyed to the *cestui que trust*. *O'Kill v. Campbell*, 13
2. Equity, for satisfactory, sufficient cause, will direct a change of trustees. *ib.*
3. Neither the donee of trust property, nor any other person into whose hands it may come, has a right to apply it to any other purpose than that for which it was originally intended. *Associate Reformed Church v. Trustees of Theological Seminary*, 77
4. Where property has been given in trust for a church not incorporated, it is competent for any person belonging to that church, on behalf of himself and of all others belonging to that church and entitled to the use of the funds, to come into a court of equity to enforce the execution of the trust. *ib.*

8. And if the church consists of various congregations, any one or more of such congregations, being incorporated, may in like manner enforce the execution of the trust. *ib.*

Vide WILL, 5, 6. HUSBAND AND WIFE, 9—11.

U.

USURY.

1. The taking of usurious interest upon a bond, will not vitiate a valid instrument, but if taken by the obligee it furnishes prima facie evidence that the original agreement was corrupt. *Varick's Ex'r v. Crane*, 128
2. To constitute usury there must be a corrupt agreement to receive more than the law allows by way of interest. *ib.*
3. The second section of the act against usury, by which it is enacted, that all mortgages made for the payment of money lent, on which a higher interest is received or taken than is allowed by the said act, shall be utterly void, applies only to securities given contrary to the provisions of the first section of the act, and does not avoid a mortgage made and executed in this state, to secure the payment of a bond upon which a higher rate of interest is reserved, if the bond is valid by the law of the place of the contract. *ib.*

V.

VENDOR AND PURCHASER.

1. Where the vendor agrees to convey a farm "said to contain one hundred and thirty-five acres, be the same more or less," and the deed executed in pursuance of the agreement describes the land by courses and distances, and adds, "containing one hundred and thirty-five acres, be the same more or less," if there proves to be a deficiency of over twenty acres in the quantity of land actually conveyed, the purchaser, upon a bill filed by the vendor for the foreclosure of a mortgage given to secure a part of the purchase money, will be entitled to have an abatement or compensation for the deficiency in the quantity of land. *Couse v. Boyles*, 212
2. Under such circumstances the court will not first direct the land to be sold, to ascertain whether it will not, at the reduced quantity, bring the price at which it was sold. *ib.*
3. Where land is sold as containing so many acres, more or less, if the quantity on an actual survey and estimation, either overrunning or falling short of the contents named, be small, no compensation should be received by either party: the words "more or less," must be intended to meet such a result; but if the variance be considerable, the party sustaining the loss should be allowed for it, and this

- rule should prevail when it arises from mistake only, without fraud or deception. *ib.*
4. And it seems that the rule applies although the land is not bought or sold professedly by the acre, the presumption being that in fixing the price regard was had to the quantity. *ib.*
 5. If the purchaser know the true quantity at the time of his purchase, or there are words used clearly indicating the intention of both parties not to be governed in the sale by the amount of land, the purchaser will not be entitled to relief. *ib.*
 6. It is not a sufficient objection to allowing an abatement of the price, that the contract has been executed. *ib.*
 7. The fact that the purchaser lives near the land and sees it daily, can have no bearing on the question, nor can the doctrine of *error emptor* have any application. A purchaser has a right to rely upon the vendor for the number of acres, and may place implicit confidence in his statements. *ib.*
 8. Where the deficiency in the quantity of land sold, is ascertained by the vendor between the execution of the contract of sale and the delivery of the deed, he is bound to make it known to the purchaser; and with a knowledge of the deficiency, to deliver a deed to the purchaser for a greater number of acres than the tract contains, without disclosing the truth respecting it, is a palpable fraud. *ib.*
 9. It is one of the most familiar and well settled principles of a court of equity, that the vendor of real estate has a lien on the lands sold for the purchase money. *Brinkerhoff v. Vansciven*, 251
 10. The lien exists not only as against the vendee, but also as against persons holding under him with notice. *ib.*
 11. To constitute the lien as against a purchaser under the original vendee, there must be notice of the indebtedness, and that the indebtedness arose upon the purchase of the property. *ib.*
 12. It is not necessary that there should be notice that the indebtedness constitutes a lien on the land. *ib.*
 13. The acceptance by the vendor of other than the personal security of the vendee, or any other circumstance showing that the vendor does not look to the land as his security, will be an implied waiver of his lien. *ib.*
 14. The taking of the note or bond of the vendee for the purchase money, will not avoid the lien. *ib.*
 15. No express agreement is necessary to create the lien; it results as an incident of the sale, unless it be expressly waived, or there be such special circumstances as show that the parties did not intend the lien should exist. *ib.*
 16. The giving of a mortgage by the purchaser for a part of the purchase money, to a third party, on the day of the purchase, will not affect the lien, as between the vendor and vendee. *ib.*

17. The purchaser of real estate by deed of warranty, has a right to relief in-equity against the vendor, who seeks to enforce the payment of a bond and mortgage given for the purchase money, until a suit actually brought to recover the premises by a person claiming them by a paramount title, shall have been determined. *Jaques v. Esler*, 461
 18. Possession, to constitute notice of a claim of title sufficient to put a purchaser on inquiry, must be an actual possession, manifested by notorious acts of ownership, such as would naturally be observed by and known to the public. *Holmes v. Stout*, 492
 19. The grantee of a *bona fide* purchaser without notice, is not to be charged with the incumbrance or fraud, although known to such grantee before he acquired his title. *ib.*
- Vide AGREEMENT, 16—18. MORTGAGE, 8, 23—27. SHERIFF AND SHERIFF'S SALE, 4, 5.

W.

WASTE. Vide INJUNCTION, II.

WATER COURSE.

1. The right to flow back water acquired by prescription, is as absolute as any other right. *Hulme v. Shreve*, 116
2. A party who has acquired such right, is entitled to the use of the whole of the head of the stream as far back as he flows, in the manner he has been accustomed to use it; and if another seek to change the manner of use, he must show conclusively that the change will not be prejudicial to the occupant. *ib.*
3. Will not the party having such right be protected against any change in the manner of his enjoyment, even if no actual injury can be proved to result from such change?—*Quere.* *ib.*
4. Any particular use of water, or diversion from its accustomed channel, for twenty years, undisturbed and uninterrupted, will raise the presumption of a grant. *Shields v. Arndt*, 234
5. It seems, too, that as twenty years' possession will give a right, so a nonuser for the like term will put an end to it. *ib.*
6. To constitute a water-course, there must be a stream *usually* flowing in a particular direction, though it need not flow continually. *ib.*
7. A hollow or ravine, through which water flows only in times of rain or the melting of snow, is not, in legal contemplation, a water-course. *ib.*
8. If a party unlawfully turns a stream of water upon the land of an adjoining proprietor, no right to the water is thereby conferred, and the wrong-doer may divert the water again at any time within twenty years. *ib.*

Vide INJUNCTION, 9, 15.

WILL.

1. A testator devised as follows :—"I do give, devise and bequeath unto my daughter Maria, the wife of J. R. M., all that farm, &c. now in the occupation and possession of the said J. R. M. To have and to hold the farm unto my said daughter M., her heirs and assigns for ever; not in any manner subject to the sale or disposal of her said husband, in any way, manner or form whatever." *Held*, that it was not the intention of the testator to exclude the husband of the devisee from his estate by curtesy in the land devised. *Mullany v. Mullany*, 16
2. If a testator devise to a feme covert an estate of inheritance in fee simple, he cannot by any restriction or provision in the will deprive the husband of the devisee of his estate by the curtesy in the land devised. *ib.*
3. Those incidents which by law are inseparably annexed to an estate, cannot be prohibited by any condition or limitation expressed in the deed or will. *ib.*
4. In giving construction to a devise, the intention of the testator should be regarded unless it be contrary to the rules of law, in which case it should be considered void as well in a court of equity as of law. *ib.*
5. In cases of trusts executed or immediate devises, where the trusts are directly and wholly declared by the testator to attach on the lands immediately under the will itself, the construction by courts of law and of equity should be the same. *ib.*
6. But in cases of exocutory or imperfect trusts which are only directory, or prescribe the intended limitations of some future conveyance, courts of equity, in striving to ascertain the intention of testators, have not adhered strictly to the rules of construction adopted by courts of law, but have directed those conveyances to be made in such manner as to carry out the intention of the testator, as ascertained from an examination of the whole will. *ib.*
7. A man cannot by will create such an estate, as by the rules of the common law he could not in his life time create by deed. *ib.*
8. A testator devises unto his son, J. P., his mansion-house farm in fee, "with this reserve, that the said J. P. or his heirs afford a lawful maintenance to my daughter A. S. and her two daughters from said farm, as long as they live and should want the same." He further devises as follows: "I will that my daughter A. S. should abide, and have a lawful maintenance, and her two youngest daughters with her, on said home farm, as long as she the said A. S. lives, and her two daughters shall want their maintenance." *Held*, that after the death of A. S. her daughters were not bound to remain upon the home farm to entitle themselves to the provision made for them in the will. *Stillwell v. Pease*, 74

9. Lands acquired after the publication of a will, will not pass by a devise in the will. *Bruen v. Bragaw*, 261
10. A testator, after numerous general and specific legacies, gives as follows:—"After all my just debts are paid, and the expense of fulfilling this my last will and testament, I give and bequeath all the remainder of my property, both real and personal, of whatsoever kind and description, to be equally divided among my four cousins, J., R., G. and J. W." *Held*, that the testator designed to charge the lands devised in the residuary clause with the payment of the debts and legacies, not as a primary fund, but in aid of the personal estate. *White v. Olden's Ex'rs*, 343
11. A testator bequeathed the one equal undivided eighth part of the residue and remainder of his estate, both real and personal, to his son, J. K. "to hold and to have the issues, profits, rents and interest arising from the said bequest during his natural life, but not to have and to hold it in fee simple, to sell and commit waste thereof, and at his decease to descend to his legal heirs at law." *Held*, that the legatee took an absolute interest in the personal estate. *Key v. Key's Ex'rs*, 495
12. Where a testator charges his lands with the payment of legacies, and devises the use of the land to his wife as long as she remains his widow, in lieu of her dower; if the widow accepts the devise, she takes it subject to the incumbrance of the legacies. *Stevenson v. Brown*, 503
13. The settled principle of equity is, that he who accepts a benefit under a will, must conform to all its provisions and renounce every right inconsistent with them. *ib.*
14. There is no rule distinguishing between the widow and other devisees. *ib.*

Vide CAVEAT. HEIRS AND DEVISEES, 1, 2. LEGACY. PROBATE.







